

# Categorizing *Chevron*

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*What is the Chevron doctrine? Everyone knows Chevron as a doctrine that has governed judicial review of agency interpretations of ambiguous statutes for more than thirty years. Yet courts and commentators continue to disagree over how the doctrine works and what it requires courts to do. Contributing to the disagreement is a categorization problem: Is Chevron a standard of review, a rule of decision, or a canon of construction? Most cases in which courts might apply Chevron can be resolved without answering that question, but some cannot. Two recent debates about Chevron particularly raise the categorization issue: whether the government can waive or forfeit Chevron deference, and also whether or under what circumstances the Supreme Court might overturn Chevron notwithstanding stare decisis. This article contemplates Chevron's categorization and the implications of each alternative before explaining why Chevron is best considered a standard of review.*

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## I. INTRODUCTION

The *Chevron* doctrine is ubiquitous. All lawyers, and a fair number of nonlawyers, know about it.<sup>1</sup> In the case of *Chevron*, however, knowing of the doctrine really only gets a person so far. Broadly, *Chevron* calls for courts to defer to reasonable interpretations<sup>2</sup> of ambiguous statutory provisions offered by the administering agency in formats carrying the force of law. Sometimes, applying that doctrine is straight forward. In other instances, it is not.<sup>3</sup>

In describing the courts' role in reviewing an agency's interpretation of a statute, the Supreme Court in *Chevron* counseled that a reviewing court first

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<sup>1</sup>The *Chevron* doctrine has been discussed in multiple mainstream publications in the past few years. See, e.g., Tyler Olson, *In Supreme Court Dissent, Thomas Cites Thomas in Arguing to Overturn Decision Authored by Thomas*, FOX NEWS (Feb. 24, 2020), <https://www.foxnews.com/politics/in-dissent-thomas-cites-thomas-arguing-court-should-overrule-decision-authored-by-thomas> [<https://perma.cc/7PLV-4WF7>]; Jeremy W. Peters, *Trump's New Judicial Litmus Test: Shrinking 'the Administrative State'*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/us/politics/trump-judges-courts-administrative-state.html> [<https://perma.cc/UEU7-Y7VC>]; Jeffrey Pojanowski, *The Curveball in the Gorsuch Nomination*, CNN (Feb. 2, 2017), <https://www.cnn.com/2017/02/02/opinions/curveball-in-gorsuch-nomination-pojanowski/index.html> [<https://perma.cc/JXR5-84FX>]; George F. Will, Opinion, *Gorsuch Strikes a Blow for Constitutional Equilibrium*, WASH. POST (Apr. 22, 2018), [https://www.washingtonpost.com/opinions/gorsuch-strikes-a-blow-for-constitutional-equilibrium/2018/04/20/78139ef6-43f2-11e8-bba2-0976a82b05a2\\_story.html](https://www.washingtonpost.com/opinions/gorsuch-strikes-a-blow-for-constitutional-equilibrium/2018/04/20/78139ef6-43f2-11e8-bba2-0976a82b05a2_story.html) [<https://perma.cc/G7BB-FUHN>].

<sup>2</sup>We recognize the extensive literature distinguishing the concepts of interpretation and construction for statutes, the Constitution, and otherwise. See generally, e.g., Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010); Lawrence B. Solum & Cass R. Sunstein, Essay, *Chevron As Construction*, 105 CORNELL L. REV. 1465 (2020); Peter M. Tiersma, *The Ambiguity of Interpretation: Distinguishing Interpretation from Construction*, 73 WASH. U. L.Q. 1095 (1995). Although we find this literature insightful and not incompatible with our thesis, for the most part, we regard it as tangential to our project. The Supreme Court's *Chevron* jurisprudence uses the terms interchangeably. See, e.g., Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005); Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp., 503 U.S. 407, 417 (1992); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). For purposes of this article, we do the same.

<sup>3</sup>*Chevron*, 467 U.S. at 842–44; see also, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (announcing that only agency pronouncements carrying legal force are eligible for *Chevron* deference).

should undertake its own inquiry into the statute's meaning.<sup>4</sup> "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>5</sup> So far, so good—evaluating statutory meaning is not easy, but it is what courts do, whether or not an agency is involved. In a footnote to this passage, the Court even instructed judges to use "traditional tools of statutory construction" to ascertain congressional intent, much as they have always done.<sup>6</sup>

A more controversial aspect of the *Chevron* doctrine derives from what the Court said next.

If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>7</sup>

The Court went on to describe statutory ambiguities as delegations of authority to make policy and to contend that, "[i]n such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."<sup>8</sup>

Decades after the Supreme Court decided *Chevron*, courts and commentators continue to disagree over how *Chevron* works and what it requires courts to do. How ambiguous must a statute be before courts shift into a deferential posture,<sup>9</sup> and what makes an interpretation reasonable, and thus worthy of deference?<sup>10</sup> On its face, *Chevron* has two steps, but some argue the

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<sup>4</sup> *Chevron*, 467 U.S. at 842–43.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 843 n.9.

<sup>7</sup> *Id.* at 843 (footnotes omitted).

<sup>8</sup> *Id.* at 844.

<sup>9</sup> Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520–21 ("How clear is clear? It is here, if *Chevron* is not abandoned, that the future battles over acceptance of agency interpretations of law will be fought."); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2137–38 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (Oxford Univ. Press 2014)) (noting that judges observe clarity thresholds ranging from 55–45 to 90–10).

<sup>10</sup> Scalia, *supra* note 9, at 521 (observing that different approaches to statutory interpretation will yield different perceptions regarding the "range of 'reasonable' interpretation[s] that the agency may adopt and to which the courts must pay deference"). See also generally Gary Lawson, *Outcome, Procedure, and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313 (1996) (making the case for a narrow *Chevron* step two focused purely on statutory interpretation outcomes); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997) (surveying different approaches to the reasonableness inquiry and advocating in favor of a combination with *State Farm* arbitrariness or reasoned decisionmaking analysis).

two steps are really one,<sup>11</sup> plus the Court added a step zero many years ago,<sup>12</sup> leading still others to contend we should add even more steps, or maybe already have.<sup>13</sup>

*Chevron* has always been controversial,<sup>14</sup> but lately the criticism has been amplified significantly.<sup>15</sup> To its critics, the *Chevron* doctrine has become the Frankenstein's monster of administrative law: a hideous "behemoth" that has escaped its restraints and is wreaking havoc on its creator, the courts, the Constitution, and the American public.<sup>16</sup> By this account, *Chevron* routinely forces judges to defer to agencies' interpretations of ambiguous statutes, and thus requires courts to abdicate their judicial role and power.<sup>17</sup>

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<sup>11</sup> Matthew C. Stephenson & Adrian Vermeule, Essay, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 597–98 (2009) (explaining the one-step *Chevron*); see also *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring in part and concurring in the judgment) (citing Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 599 (2009)).

<sup>12</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (adopting the standard that has been labeled step zero); see also Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001) (coining the term); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191–94 (2006) (identifying and analyzing *Mead's* step zero).

<sup>13</sup> See, e.g., Cary Coglianese, *Chevron's Interstitial Steps*, 85 GEO. WASH. L. REV. 1339, 1339, 1361–63 (2017) (mapping an entire "staircase" of "interstitial steps" within *Chevron* analysis); Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 758–60 (2017) (counting all of *Chevron's* potential steps).

<sup>14</sup> For just a few of the many articles criticizing *Chevron* over the years, see Christopher Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561, 587–88 (describing *Chevron* as "the Supreme Court's conceptually flawed effort to control the inclinations of some lower court judges to impose their politically unaccountable, unreconstructed New Deal prejudices to push the bureaucracy toward an aggressive regulatory stance"); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) (describing *Chevron* as "a siren's song, seductive but treacherous" as it changes the allocation of power among the federal government's branches); Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 678–80 (2007) (suggesting that *Chevron* misunderstands agencies' "operational, policy-implementing role").

<sup>15</sup> See, e.g., *Baldwin v. United States*, 140 S. Ct. 690, 691–94 (2020) (Thomas, J., dissenting from the denial of certiorari) ("*Chevron* is in serious tension with the Constitution, the [Administrative Procedure Act], and over 100 years of judicial decisions."); Michael Kagan, *Loud and Soft Anti-Chevron Decisions*, 53 WAKE FOREST L. REV. 37, 47–49 (2018) (highlighting recent Supreme Court opinions that are either openly or covertly critical of *Chevron*).

<sup>16</sup> See generally MARY SHELLEY, *FRANKENSTEIN* (Penguin Classics 2003).

<sup>17</sup> See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("*Chevron* deference precludes judges from exercising [independent] judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction."); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron* step two tells us we must allow an executive agency to resolve the meaning of any ambiguous statutory provision. In this way, *Chevron*

Underlying and perhaps even driving some of the angst and rancor is disagreement over exactly what kind of legal doctrine *Chevron* is. To some, *Chevron* operates as a rule of decision that dictates case outcomes, forcing courts to decide cases contrary to their own perceptions of what the law requires.<sup>18</sup> Indeed, some of *Chevron*'s harshest critics seem to view *Chevron* this way, undoubtedly at least in part because the Supreme Court at times has used mandatory rhetoric in describing the doctrine's application.<sup>19</sup> Others think of *Chevron* as a standard of review—a judicial “mood” that affects how parties structure their arguments and how a court perceives its role vis-à-vis agencies, but that is flexible and not so outcome determinative.<sup>20</sup> Finally, still others have suggested that *Chevron* more closely resembles a canon of statutory interpretation, with the Supreme Court conducting its own statutory inquiry and treating the agency's interpretation more as a “plus factor” to justify an interpretive result.<sup>21</sup> By that view, *Chevron* may be regarded as merely one of many tools that guide but do not dictate judicial analysis of statutory language.<sup>22</sup>

So which characterization of *Chevron* is correct? And does the question even matter?

Depending on the case and the context, *Chevron* may well fit into any or even all of the above-described categories. These categories—rule of decision, standard of review, and canon of statutory interpretation or construction—are not necessarily mutually exclusive.<sup>23</sup> The labels sometimes mean different things to different people, so the contours of each category are hard to define. Even as defined, the boundaries of each category are fuzzy and may overlap. Still, at least as described by this article, each category represents a distinct doctrinal concept that carries its own set of first principles. Those principles can

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seems no less than a judge-made doctrine for the abdication of the judicial duty.”), *vacated*, *In re Gutierrez Brizuela*, 2018 WL 1756899 (2018); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 315–16 (2014); *cf.* *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (criticizing a trend of “reflexive deference” in the circuit courts).

<sup>18</sup> See Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1348–49 (2018) (synthesizing the results of interviews with circuit court judges, some of whom felt forced to follow *Chevron* despite their skepticism of its approach).

<sup>19</sup> See *infra* Part II.A.

<sup>20</sup> See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (comparing a standard of review to a “mood”); see also *infra* Part II.B.

<sup>21</sup> See *infra* Part II.C.

<sup>22</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (instructing reviewing courts to ascertain congressional intent at *Chevron* step one using “traditional tools of statutory construction”).

<sup>23</sup> Maureen Callahan has suggested additionally that *Chevron* could be a “rule of abstention in favor of another governmental decisionmaker” in a manner akin to “prudential limitations on justiciability in the federal courts.” Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron U.S.A. v. Natural Resources Defense Council*, 1991 WIS. L. REV. 1275, 1289. Although interesting, Callahan's characterization has not gained the same traction as the three discussed in this article, so we will leave considering it for another day.

provide a theoretical starting point when confronting certain questions about the *Chevron* doctrine.

Also, in many cases, how we categorize the *Chevron* doctrine may not matter very much. Courts often find agency statutory interpretations clearly “right” or clearly “wrong” at *Chevron* step one,<sup>24</sup> or they otherwise signal that they would either uphold or reject the agency’s interpretation irrespective of *Chevron*.<sup>25</sup>

In certain instances, however, how we characterize *Chevron* could matter a lot. Two prominent (and, at present, hotly debated) examples come readily to mind.

The first is an emerging issue that is dividing circuit court judges and has attracted the attention of Justice Gorsuch as well: whether the government can waive or forfeit *Chevron* deference.<sup>26</sup> Some judges conceive of *Chevron* as the sort of legal argument that agencies must raise and even argue at some length in order to preserve, and an agency’s failure to do so in briefing obviates the court’s need to consider the *Chevron* doctrine at all.<sup>27</sup> But some legal doctrines and

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<sup>24</sup> See, e.g., *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018) (deciding against the agency at step one); *Roberts v. Sea-Land Servs.*, 566 U.S. 93, 113 n.12 (2012) (deciding in favor of the agency at step one); see also Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 32–34 (2017) (finding that federal circuit courts resolved 30% of *Chevron* applications from 2003 through 2013 at *Chevron* step one).

<sup>25</sup> See, e.g., *Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015) (rejecting deference because the agency’s interpretation “makes scant sense”); *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 544–45 (2008) (concluding that agency’s interpretation was right without addressing belated claim to *Chevron* deference); *WildEarth Guardians v. U.S. EPA*, 728 F.3d 1075, 1082 (10th Cir. 2013) (finding the agency’s interpretation “persuasive” regardless of the standard applied).

<sup>26</sup> See *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (mem.) (statement of Gorsuch, J.) (“This Court has often declined to apply *Chevron* deference when the government fails to invoke it.”); *Martin v. Soc. Sec. Admin.*, 903 F.3d 1154, 1161 (11th Cir. 2018) (per curiam) (recognizing active circuit split over whether *Chevron* deference can be waived); see also *infra* Part III.A.

<sup>27</sup> See, e.g., *Neustar, Inc. v. FCC*, 857 F.3d 886, 893–94 (D.C. Cir. 2017) (concluding that an agency had “forfeited any claims to *Chevron* deference” by making only a “nominal[] reference[]” to *Chevron* in its brief); *Commodity Futures Trading Comm’n v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008) (“[T]he [agency] waived any reliance on *Chevron* deference by failing to raise it to the district court.”); see also *Aposhian v. Barr*, 958 F.3d 969, 998 (10th Cir. 2020) (Carson, J., dissenting) (objecting to the application of *Chevron* when the government disavowed reliance on it). See generally Jeremy D. Rozansky, Comment, *Waiving Chevron*, 85 U. CHI. L. REV. 1927 (2018) (discussing the prospect that agencies can waive *Chevron* deference by not affirmatively raising it or by intentionally abandoning it).

arguments—like standards of review<sup>28</sup> and canons of statutory interpretation<sup>29</sup>—cannot be waived or forfeited. So what is *Chevron*?

The second question is more fundamental: should the Court overturn *Chevron*? Some of *Chevron*'s critics have called for *Chevron* to be overruled,<sup>30</sup> and several Supreme Court Justices seem amenable to the notion.<sup>31</sup> Whether the Court overturns *Chevron* could depend at least in part on its perception of how principles of stare decisis might apply. In turn, how stare decisis applies may depend upon how one categorizes *Chevron*.<sup>32</sup>

Our goal with this article is to explore these alternative characterizations of the *Chevron* doctrine, and some of the implications of each. We ultimately propose that, when it matters, *Chevron* is best understood as a standard of review. We acknowledge the limitations of our framing and we do not ignore or deny that some aspects and judicial applications of *Chevron* make the doctrine seem in some instances more like a rule of decision or a canon of interpretation. But we do suggest that framing *Chevron* as a standard of review should affect how one perceives its characteristics. And we argue that *Chevron* is an evolving

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<sup>28</sup> See, e.g., *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 286 (4th Cir. 2018) (citing several circuits for “parties ‘cannot waive the proper standard of review by failing to argue it’”) (citation omitted); *Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir. 2015) (citing decisions from several circuits for the proposition that “[a] party cannot waive, concede, or abandon the applicable standard of review”), *abrogated on other grounds by Ayestas v. Davis*, 138 S. Ct. 1080 (2018).

<sup>29</sup> See, e.g., *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 22 (D.C. Cir. 2019) (per curiam) (“We, for example, would give no mind to a litigant’s failure to invoke canons such as *expressio unius* or constitutional avoidance even if she intentionally left them out of her brief.”), *cert. denied*, 140 S. Ct. 789 (2020) (mem.); cf. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (“When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”).

<sup>30</sup> See, e.g., Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782 (2010); Ronald A. Cass, *Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294, 1300–01, 1328–29 (2015); Richard W. Murphy, *Abandon Chevron and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 7 (2017).

<sup>31</sup> See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring), *vacated*, *In re Gutierrez Brizuela*, No. XXXX XX3 099, 2018 WL 1756899 (B.I.A. Jan. 4, 2018); see also *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Roberts, C.J., concurring in part) (contending that the Supreme Court’s decision not to overturn *Auer* deference does not preclude reconsideration of *Chevron*); *Kisor*, 139 S. Ct. at 2448–49 (Kavanaugh, J., concurring in the judgment) (agreeing with Chief Justice Roberts, with Justice Alito joining).

<sup>32</sup> See, e.g., Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1765 (2010) (“[T]he Court does not give stare decisis to any statements of statutory interpretation methodology.”) (footnote omitted); see also *infra* Part III.B.

judicial construction of the APA § 706(2)(A) arbitrary and capricious standard, which is unquestionably a standard of review.

This article proceeds in three Parts. Part II describes the parameters of our categories and how *Chevron*'s characteristics make it resemble alternatively a rule of decision, a canon of construction, and a standard of review. Part III considers why categorizing *Chevron* may be helpful in evaluating the contemporary issues of whether *Chevron* can be waived or forfeited and whether *Chevron* should be overturned. Part IV makes the case that *Chevron* is best understood primarily as a standard of review.

## II. CATEGORICAL ALTERNATIVES

Categorizing *Chevron* first requires defining the parameters and characteristics of the alternatives: rule of decision, standard of review, and canon of construction. The task is complicated by the fact that the categories themselves are flexible in their meaning. At first blush, the labels sometimes conjure up different ideas for different people, some of which are overlapping or simply muddle the categories with one another. This difficulty does not render the categories meaningless. As described below, all three are well understood in contemporary jurisprudence and academic literature. Still, to avoid confusion, some explication of the categories is necessary, along with explanation of how *Chevron* would appear to fall within each.

### A. Rule of Decision

In our system of judicial review and its resolution of disputes, some questions are primary, conclusively determining legal rights and obligations or the legal consequences of past or future behavior. Other questions are secondary. They contribute to the process of judicial decisionmaking. They require their own doctrinal analysis. Their resolution may even be outcome determinative in a particular case. But they are not really what brought litigants to court in the first instance.

*Black's Law Dictionary* defines a "rule of decision" as "[a] rule, statute, body of law, or prior decision that provides the basis for deciding or adjudicating a case."<sup>33</sup> The definition's allusion to the resolution of case outcomes suggests that it is limited to those primary questions that determine legal rights, obligations, or consequences.

To be clear, a rule of decision need not be a bright line. The legal principles that courts apply to resolve disputes fall along a continuum of rules and

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<sup>33</sup> *Rule of Decision*, BLACK'S LAW DICTIONARY (11th ed. 2019).



standards.<sup>34</sup> The three-part balancing test adopted by *Mathews v. Eldridge*<sup>35</sup> for evaluating whether an agency's hearing procedures satisfy the Due Process Clause of the U.S. Constitution is no less a rule of decision for being a classic standard rather than a bright-line rule.<sup>36</sup> Likewise, the logical outgrowth test for evaluating the adequacy of a notice of proposed rulemaking under Administrative Procedure Act § 553, which requires a court to decide "if interested parties should have anticipated [from the notice] that the change [between the proposed and final rules] was possible" is a standard.<sup>37</sup>

Correspondingly, the fact that rules of decision often take the form of standards rather than bright-line rules means that courts and scholars will sometimes refer to them as standards of review, in the sense that they are standards that govern judicial decisionmaking. A key example comes from the doctrines for evaluating Equal Protection Clause claims, which are styled in terms of strict, intermediate, and rational basis scrutiny and represent the only real effort to operationalize that constitutional text.<sup>38</sup>

Irrespective of whether they take the form of rules or standards, however, all of the above-described doctrines are judge-made from whole cloth—construing and operationalizing, respectively, constitutional and statutory text that does not mention their terms.<sup>39</sup> The key point is that, through applying those standards, and other decision rules like them, courts resolve complaints that government agencies have acted outside the boundaries of the law. And, in turn,

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<sup>34</sup> For just a few examples of the voluminous literature on rules and standards in law, see generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000); Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J.L. & PUB. POL'Y 101 (1997); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Kathleen M. Sullivan, Foreword, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

<sup>35</sup> *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (evaluating the constitutionality of agency hearing procedures by weighing (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

<sup>36</sup> The constitutional theory literature sometimes speaks of the Supreme Court's development of these standards in terms of metadoctrines or construction versus interpretation. See generally, e.g., Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); Solum, *supra* note 2.

<sup>37</sup> *Council Tree Commc'ns, Inc. v. FCC*, 619 F.3d 235, 249–50 (3d Cir. 2010) (describing the logical outgrowth test for determining compliance with APA § 553(b) and (c)); see, e.g., *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079–80 (D.C. Cir. 2009) (same); *Miami-Dade Cty. v. U.S. EPA*, 529 F.3d 1049, 1058–59 (11th Cir. 2008) (same).

<sup>38</sup> See, e.g., Cain Norris & Whitney Turk, *Equal Protection*, 14 GEO. J. GENDER & LAW 397, 400–07 (2013) (describing the tiers of equal protection analysis).

<sup>39</sup> See, e.g., Berman, *supra* note 36, at 64–78 (describing judge-made operational rules).

these decision rules guide the primary behavior of government actors. It is for this reason that all of these doctrines represent rules of decision.

In the realm of statutory interpretation, as the *Black's Law* definition suggests, the statute itself at least theoretically provides the basis for resolving legal rights, obligations, and consequences. Yet, statutes frequently fail at first glance to answer statutory questions.<sup>40</sup> Courts routinely bring to bear different interpretive methods, tools, and—yes—deference doctrines to help them glean congressional intent and resolve questions of statutory meaning.<sup>41</sup> Those methods, tools, and doctrines are not specific to any one interpretive question or statute, but rather are generally applicable across a wide range of statutes and subject matters.<sup>42</sup> Consequently, in the statutory interpretation context, it may be more accurate to say that whether a particular doctrine speaks to primary as opposed to secondary decisionmaking—that is, whether a doctrine is a rule of decision—depends upon whether that doctrine is itself binding, conclusive, and outcome determinative.

*Chevron* has several features that could support its categorization as a rule of decision in this vein. Courts and commentators frequently use mandatory rhetoric to describe *Chevron*.<sup>43</sup> Some opinions of the Supreme Court and of individual Justices present and apply *Chevron* in a manner that allows the doctrine to be cast as relatively rote in its application and predictable in its outcomes.<sup>44</sup> Finally, empirical work has shown that lower court judges feel bound in their decisionmaking by *Chevron*,<sup>45</sup> in a manner reminiscent of a rule of decision.

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<sup>40</sup> Cf. Robert A. Katzmann, *Response to Judge Kavanaugh's Review of Judging Statutes*, 129 HARV. L. REV. F. 388, 388 (2016) (observing that judges can disagree over “how to proceed when, as is often the case, the statute defies easy comprehension, when something less than clarity reigns”).

<sup>41</sup> See, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71–76 (2006) (comparing textualism and purposivism as interpretive methods); Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 80–89 (2018) (describing textual and substantive canons and their justifications, including by reference to legislative supremacy and congressional preference); see also *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (justifying deference as a means of honoring Congress's delegation of authority to agencies).

<sup>42</sup> See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, Foreword, *Law as Equilibrium*, 108 HARV. L. REV. 26, 66–67 (1994) (explaining that interpretive regimes and canons of construction can function as “off-the-rack” tools when interpreting ambiguous statutes).

<sup>43</sup> See *infra* Part II.A.1.

<sup>44</sup> See Kristin E. Hickman, *The Three Phases of Mead*, 83 FORDHAM L. REV. 527, 537–41 (2014).

<sup>45</sup> Gluck & Posner, *supra* note 18, at 1348–49.

### 1. Chevron's Mandatory Rhetoric

Mandatory language pervades both courts' analyses and scholarly discussions surrounding *Chevron*. Justice Stevens' opinion in *Chevron* itself used mandatory language, declaring that a court "*may not* substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."<sup>46</sup> The Supreme Court often has counseled that, once a reviewing court establishes that *Chevron* applies and that the underlying statute is ambiguous regarding the statutory question presented, the court "*must* defer" to an agency's reasonable interpretation of the statute.<sup>47</sup> Other cases use different rhetorical formulations, with words like "required"<sup>48</sup> or "obligated,"<sup>49</sup> but the implication is the same.

Such rhetoric may undermine the notion that *Chevron* is merely a framework or tool for evaluating and discerning congressional intent and statutory meaning. Instead, mandatory terms like "shall," "must," and "may not" draw the attention of reviewing courts toward the end result, which in turn may diminish the importance of robust and independent judicial analysis in favor of more pro forma findings of ambiguity.<sup>50</sup> Such a supposed potential effect on judicial psychology is of course speculative, but it seems to play out in some real cases.

In *Pauley v. BethEnergy Mines, Inc.*, for example, the Supreme Court was confronted with whether new regulations were "more restrictive than" previous regulations for evaluating claims to black lung benefits, and thus contrary to

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<sup>46</sup> *Chevron*, 467 U.S. at 844 (emphasis added).

<sup>47</sup> See, e.g., *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016) (emphasis added) ("[A]t the second step the court must defer to the agency's interpretation if it is 'reasonable.'") (subsequent history omitted); *Scialabba v. Cuellar de Osorio*, 134 S.Ct. 2191, 2203 (2014) ("[I]f the law does not speak clearly to the question at issue, a court must defer to the Board's reasonable interpretation, rather than substitute its own reading."); *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) ("[W]hen the statute 'is silent or ambiguous' we must defer to a reasonable construction by the agency charged with its implementation."); see also Gluck & Posner, *supra* note 18, at 1345 (describing *Chevron* as the "interpretive rule that courts must defer to reasonable agency interpretations of ambiguous statutes").

<sup>48</sup> *Beth Rochel Seminary v. Bennett*, 825 F.2d 478, 481 (D.C. Cir. 1987) ("[W]e are required to defer to the Department's permissible construction of the Act.").

<sup>49</sup> *Pereira v. Sessions*, 138 S.Ct. 2105, 2122 (2018) (Alito, J., dissenting) ("[U]nder *Chevron* we are obligated to defer to a Government agency's interpretation of the statute that it administers so long as that interpretation is a permissible one.") (internal quotation marks omitted).

<sup>50</sup> See, e.g., *id.* at 2120–21 (Kennedy, J., concurring) (accusing circuit courts of a "type of reflexive deference" with only "cursory analysis of the questions whether, applying the ordinary tools of statutory construction, Congress' intent could be discerned, and whether the [agency's] interpretation was reasonable") (internal citation omitted); E. Garrett West, *A Youngstown for the Administrative State*, 70 ADMIN. L. REV. 629, 660–61 (2018) (identifying *Chevron* as a standard of review but claiming that *Chevron* provides a "rule of decision for situations when the statute yields no clear answer").

statutory requirements.<sup>51</sup> After summarizing the case background and circuit court disagreement,<sup>52</sup> Justice Blackmun did not employ any of the traditional tools for evaluating statutory meaning but rather launched directly into a summary of the statute's "complex and highly technical regulatory program," the agency's expertise, and the Court's deferential posture.<sup>53</sup> He acknowledged that the challengers' "parsing of these impenetrable regulations would be consistent with accepted canons of construction," but maintained "that the Secretary's interpretation need not be the best or most natural one by grammatical or others standards."<sup>54</sup> He even called it "axiomatic" that "the Secretary's view need be only reasonable to warrant deference."<sup>55</sup>

In the face of precedents like this one, it is hardly surprising that lower courts absorbed a message that *Chevron* demanded them to subordinate their judgment to that of agencies. In a recent survey by Judge Richard Posner and Prof. Abbe Gluck, a majority of federal appellate judges reported that they had deferred under *Chevron* when they did not want to do so.<sup>56</sup> As one judge responded, "I apply [*Chevron*] because I don't see any way out of it."<sup>57</sup>

Even when the Court evaluates the statute for itself and rejects the agency's interpretation, it often couches its refusal to defer in terms that make *Chevron* as a doctrine seem like a rejected alternative—notwithstanding the doctrine's specific inclusion of judicial analysis of statutory clarity at *Chevron* step one. For example, in *Pereira v. Sessions*, the Court considered whether a document that fails to specify the time or place of a noncitizen's removal proceedings can be a "notice to appear" under the relevant statutory provision.<sup>58</sup> Concluding that such a document would not meet the statutory requirements, the Court noted that it "need not resort to *Chevron* deference," suggesting that the Court's interpretive result precluded application of a *Chevron* "rule."<sup>59</sup> Justice Kennedy's concurrence in *Pereira* noted discomfort with that possibility, accusing the lower courts of conducting only a "cursory analysis" of *Chevron*'s two steps.<sup>60</sup> Suggesting that *Chevron* is an alternative to independent judicial analysis, as opposed to incorporating independent judicial analysis, fosters the perception that *Chevron* is a rule of decision the Court need not always address, rather than a framework or tool that guides judicial review without dictating a particular outcome.

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<sup>51</sup> See *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 695 (1991).

<sup>52</sup> *Id.* at 690–92.

<sup>53</sup> *Id.* at 695–97.

<sup>54</sup> *Id.* at 702.

<sup>55</sup> *Id.*

<sup>56</sup> Gluck & Posner, *supra* note 18, at 1348–49.

<sup>57</sup> *Id.* at 1349.

<sup>58</sup> *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 2120 (Kennedy, J., concurring).

## 2. “Decision Tree” Applications

As noted, rules of decision can be flexible standards rather than bright lines.<sup>61</sup> Nevertheless, the more a doctrine seems to operate like a bright line rule, the more conclusive and outcome determinative it may seem. *Chevron* has often been characterized as more rule-like than other doctrines governing judicial review.<sup>62</sup> The Court’s mandatory rhetoric, as well as the routine portrayal of *Chevron* in terms of steps, make *Chevron* susceptible to that characterization.<sup>63</sup>

Complementing *Chevron*’s mandatory rhetoric, many judicial opinions seem to approach *Chevron* analysis in the manner of a “decision tree” that magnifies the impression of *Chevron* as rule-like, binding, and outcome determinative.<sup>64</sup> *Chevron* is well known for its two steps. Again, the first asks whether the meaning of the statute is clear, for if it is, then “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>65</sup> If the statute is ambiguous, however, then *Chevron* instructs the reviewing court to ask whether the agency’s interpretation of the statute is permissible or reasonable.<sup>66</sup> As the Court articulated in *United States v. Mead Corp.*, *Chevron* only applies when Congress has delegated to the interpreting agency the authority to act with the force of law and the agency, in articulating its interpretation, intended to exercise such delegated power.<sup>67</sup>

In theory, one thus can cast *Mead* and *Chevron* as requiring a sequence of separate, and relatively mechanical, “yes or no” inquiries:

1. Did Congress give the agency the authority to bind regulated parties with the force and effect of law?<sup>68</sup> If so,
2. Did the agency exercise that authority when it adopted the interpretation at issue?<sup>69</sup> If so,

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<sup>61</sup> See *supra* notes 34–42 and accompanying text (describing generally the rule of decision category).

<sup>62</sup> See, e.g., Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 808 (2002) (characterizing *Chevron* as “more rule-like” than “the more standard-like *Skidmore*” doctrine); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1735, 1813 (2010) (describing *Chevron* as “formalist” and “rule-like” in contrast to the *Skidmore* standard).

<sup>63</sup> See Merrill, *supra* note 62, at 809–10 (concluding that *Chevron*’s steps make it seem rule-like because each step is “defined in terms of the examination of a single variable”).

<sup>64</sup> See Hickman, *supra* note 44, at 537–41 (describing the decision tree approach to *Chevron* review).

<sup>65</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

<sup>66</sup> *Id.* at 843–44.

<sup>67</sup> *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

<sup>68</sup> See Hickman, *supra* note 44, at 539 (reflecting this decision tree model of *Mead* and *Chevron* pictorially).

<sup>69</sup> *Id.*

3. Is the statute ambiguous?<sup>70</sup> If so,
4. Is the agency's interpretation based on a permissible construction of the statute? If so, defer.<sup>71</sup>

Each of these inquiries may be open-ended and flexible. Judges and administrative law scholars debate endlessly, for example, what it means for agency action to carry the force of law,<sup>72</sup> how clear is clear enough for *Chevron*'s first step,<sup>73</sup> and which tools to take into account in evaluating clarity.<sup>74</sup> Each step thus represents both a range of possible considerations and an avenue for potential judicial disagreement. But the mere fact that *Chevron* can be reduced to such a seemingly-mechanical framework gives it a strong whiff of blunt predictability and conclusiveness.

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Compare, e.g., *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 58–61 (2d Cir. 2004) (concluding that a HUD policy statement was eligible for *Chevron* deference), with *Krzalic v. Republic Tile Co.*, 314 F.3d 875, 881 (7th Cir. 2002) (reaching the opposite conclusion). For further discussion, see Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1459–64 (2005) (describing inconsistent approaches to the force of law inquiry in the circuit courts); Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 510–25 (2013) (documenting debates and disagreements over the force of law issue); Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1016–17 (2005) (arguing that an agency action should only carry the force of law if “the agency *commits* to applying it uniformly across time and parties”).

<sup>73</sup> Compare, e.g., *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45–46 (2002) (concluding that a statute was ambiguous because it was “silent” on the question before the Court and “[d]id not foreclose” the agency’s approach), with *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133–43 (2000) (analyzing statutory structure and purpose as well as history of congressional action and inaction at length in finding the statute “clear”), and *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225–31 (1994) (concluding that an agency’s interpretation went “beyond the meaning that the statute [could] bear” by analyzing dictionary definitions as well as the structure and purpose of the statutory scheme). For further discussion, see Scalia, *supra* note 9, at 520–21 (“How clear is clear? It is here, if *Chevron* is not abandoned, that the future battles over acceptance of agency interpretations of law will be fought.”); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2091 (1990) (“*Chevron* does not say how ambiguous a statute must be in order for the agency view to control.”).

<sup>74</sup> Compare, e.g., *Sierra Club v. U.S. EPA*, 793 F.3d 656, 665 (6th Cir. 2015) (considering legislative history at *Chevron* step one), and *BNSF Ry. Co. v. United States*, 775 F.3d 743, 755 & n.87 (5th Cir. 2015) (same), with *United States v. Geiser*, 527 F.3d 288, 292 (3d Cir. 2008) (“[L]egislative history should not be considered at *Chevron* step one.”). For further analysis, see Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 76–84 (2008) (discussing competing judicial approaches to the relationship between *Chevron* and substantive canons).

Several Supreme Court opinions exemplify the decision tree approach to *Chevron* analysis.<sup>75</sup> In *Household Credit Services, Inc. v. Pfennig*, for example, the Court considered a Federal Reserve Board regulation promulgated under the Truth in Lending Act (TILA).<sup>76</sup> In a unanimous opinion by Justice Thomas, the Court first concluded that the agency had authority—via an express statutory delegation—to issue binding regulations interpreting TILA, which authority the agency obviously exercised by promulgating the regulation under challenge.<sup>77</sup> The Court then proceeded to *Chevron*’s two steps. After examining TILA’s text and structure, the Court found the statute ambiguous.<sup>78</sup> The Court then proceeded to *Chevron*’s second step, examining the agency’s reasoning for its choice and finding the agency’s interpretation reasonable.<sup>79</sup>

On at least some of the occasions when its analysis has followed this rather mechanical approach to *Chevron* analysis, the Court has seemed quick—perhaps too quick—to conclude that a statutory provision is ambiguous and the agency’s interpretation is reasonable. In *Yellow Transportation, Inc. v. Michigan*, for example, the Court offered shockingly little analysis in deferring to the agency’s interpretation of the relevant statute.<sup>80</sup> The Court mentioned none of the usual tools of statutory interpretation, such as linguistic canons, dictionaries, or legislative history, in dispensing with *Chevron*’s first step, observing only that the provision at issue “d[id] not foreclose” the agency’s interpretation.<sup>81</sup> The Court acknowledged the existence of multiple alternative readings of the provision, but again with seemingly little inquiry, the Court simply concluded that the agency’s choice was reasonable and deference was appropriate.<sup>82</sup> To the extent the Court’s analysis follows this model and offers what appears to be a relatively pro forma analysis of the statute and agency reasoning,<sup>83</sup> *Chevron* looks more like a rule of decision than a deferential standard.

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<sup>75</sup> See, e.g., *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53, 58 (2011) (Roberts, C.J.); *Negusie v. Holder*, 555 U.S. 511, 517, 521 (2009) (Kennedy, J.); *United States v. Eurodif S.A.*, 555 U.S. 305, 316–17, 319–20 (2009) (Souter, J.); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005) (Thomas, J.); *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45–46 (2002) (O’Connor, J.).

<sup>76</sup> *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 235 (2004).

<sup>77</sup> *Id.* at 238.

<sup>78</sup> *Id.* at 241–42.

<sup>79</sup> *Id.* at 242–43.

<sup>80</sup> *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45–46 (2002).

<sup>81</sup> See *id.* at 45.

<sup>82</sup> *Id.* at 45–46.

<sup>83</sup> Of course, a judicial opinion may not fully articulate the entirety of a Justice’s decisionmaking process. A Justice might review statutory text, history, and purpose extensively in a search for clarity yet decide, for whatever reason, that detailing that analysis in full in the text of her opinion would be unnecessary or excessive. If one takes that possibility seriously, then perhaps it is unwise to focus too much on the reasoning a Justice offers (or fails to offer) to support her holding in a given case. Cf. Peter M. Tiersma, *The*

### 3. Chevron's Cumulative Effect

If *Chevron* is a rule of decision, one might expect to be able to discern empirically that it actually alters case outcomes. A number of studies have explored *Chevron*'s effect on agency affirmance rates, with mixed results.

William Eskridge and Lauren Baer, analyzing 1,014 Supreme Court opinions evaluating agency statutory interpretations between 1983 and 2005, found that the Court affirmed agency interpretations 76.2% of the time under *Chevron*<sup>84</sup>—more often than either de novo review or the multifactor *Skidmore* standard, but less often than the *Curtiss-Wright* doctrine, which is sometimes described as a canon of construction.<sup>85</sup> Thomas Miles and Cass Sunstein analyzed a smaller set—sixty-nine Supreme Court opinions between 1989 and 2005 in which the Court explicitly invoked *Chevron*—and found an affirmance rate of 67%.<sup>86</sup> On the other hand, Miles and Sunstein also documented a high degree of variability among the individual Justices, ranging from high rates of deference under *Chevron* for Justice Breyer at 81.8% and Justice Souter at 77% down to Justice Scalia at 53.6% and Justice Thomas at 52.2%,<sup>87</sup> which suggests that perhaps *Chevron* is not quite so rigid as its rule-like characterization might suggest. In two studies of studies predating 2010, David Zaring and Richard Pierce concluded separately that *Chevron* did not meaningfully change case outcomes.<sup>88</sup>

Turning to the circuit courts, evaluating cases from 1995 and 1996, Orin Kerr found that agencies won 73% of *Chevron* cases in circuit courts.<sup>89</sup> By comparison, with Matthew Krueger, one of us (Hickman) examined 106 cases

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*Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1248–57 (2007) (describing the “textualization” of judicial opinion writing).

<sup>84</sup> William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1094, 1099, 1142 tbl.15 (2008); see also Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1007–09 (finding an affirmance rate of 76.7% under *Chevron*).

<sup>85</sup> See, e.g., Eskridge, Jr. & Baer, *supra* note 84, at 1142; Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2062 (2017) (suggesting that “most legislation scholars” see *Curtiss-Wright* as well as *Chevron* as canons of construction); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1309–10 (1988) (“Executive branch attorneys have read [*Curtiss-Wright*] as defining a canon of deferential statutory construction for courts construing foreign affairs statutes.”).

<sup>86</sup> Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 825, 849 (2006).

<sup>87</sup> *Id.* at 831.

<sup>88</sup> Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85 (2011); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 137, 171 (2010).

<sup>89</sup> Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 30 (1998).



applying *Skidmore* deference from 2001 through 2005 and found an affirmance rate of 60.4%.<sup>90</sup> Christopher Walker and Kent Barnett's more recent and comprehensive study found an affirmance rate of 77.4% when the circuit courts applied *Chevron*, compared to 38.5% when the circuit courts applied de novo review.<sup>91</sup> But the de novo cases in Walker and Barnett's dataset only included those cases in which a court had expressly mentioned *Chevron* and then decided to apply de novo review.<sup>92</sup> In other words, Walker and Barnett did not account for cases in which a court resolved the interpretive question de novo—whether for or against the agency—without mentioning *Chevron*.<sup>93</sup> One might expect that a court that mentioned and declined to apply *Chevron* might be predisposed to reject the agency's interpretation. Still, these results led Walker and Barnett to conclude that “agency interpretations were significantly more likely to prevail under *Chevron* deference.”<sup>94</sup>

While attempts to quantify *Chevron*'s impact provide useful food for thought, their utility in evaluating *Chevron*'s categorization may be limited. Even empirical studies finding a significant *Chevron* impact signal at most a correlative relationship between *Chevron* and case outcomes. The boundaries necessarily erected when creating data sets, defining variables, and placing cases into a limited number of coded categories make any definitive statement of causation elusive. In other words, the studies do not capture the nuances of why courts might affirm agencies more often under *Chevron*. Courts applying *Chevron* may believe that doctrine dictates a particular conclusion. But it is equally plausible that the conditions leading courts to apply *Chevron* in the first instance, such as the use of notice-and-comment rulemaking or the agency's comparative expertise, yield superior agency interpretations that courts simply find more persuasive. No controlled study can meaningfully account for the wide range of factors that influence whether a court chooses to apply *Chevron* in a given case—not to mention the significant variation among courts and individual judges in what it means to apply *Chevron*.<sup>95</sup> Whatever *Chevron*'s impact on affirmance rates, it is safe to say that whether or to what extent *Chevron* drives case outcomes is unsettled.

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<sup>90</sup> Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1275 (2007).

<sup>91</sup> Barnett & Walker, *supra* note 24, at 30.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 6. But see Mark J. Richards, Joseph L. Smith, & Herbert M. Kritzer, *Does Chevron Matter?*, 28 L. & POL'Y 444, 464 (2006) (observing increased deference by the Supreme Court in the years following *Chevron* but also contending “that justices are influenced significantly, perhaps even primarily, by [the interaction of the justices’ attitudes with the policy direction of the agency decision]”).

<sup>95</sup> Cf. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1905–07 (2009).

## B. *Standard of Review*

*Chevron* is frequently described as a standard of review.<sup>96</sup> Courts and parties routinely recite the *Chevron* standard in the “standard of review” sections of judicial opinions<sup>97</sup> and briefs<sup>98</sup> when a litigant claims that an agency has misinterpreted a statute. Many proposals for eliminating *Chevron* purport to replace the doctrine with de novo review,<sup>99</sup> which certainly is a standard of review.<sup>100</sup>

In litigation, a standard of review is a “criterion by which the decision of a lower tribunal will be measured by a higher tribunal to determine its correctness or propriety.”<sup>101</sup> In the Article III context, standards of review carry labels like de novo, clearly erroneous, abuse of discretion, and plain error.<sup>102</sup> These labels represent “the degree of scrutiny with which federal appellate courts examine

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<sup>96</sup> See, e.g., *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 58 (2011) (describing a situation in which “*Chevron* provided the appropriate standard of review”); *NASDAQ Stock Mkt., LLC v. SEC*, 961 F.3d 421, 426 (D.C. Cir. 2020) (describing *Chevron* as part of determining what standard of review governs the statutory interpretation question at bar); *Renewable Fuels Ass’n v. U.S. EPA*, 948 F.3d 1206, 1244 (10th Cir. 2020) (“When reviewing an agency’s legal determination, the court generally applies the standard of review articulated by the Supreme Court in *Chevron*[.]”) (subsequent history omitted); *Perez Perez v. Wolf*, 943 F.3d 853, 864–65 (9th Cir. 2019) (instructing the district court to decide “the standard of review to apply on remand, including whether *Chevron* or *Auer* deference is appropriate”); *Sierra Club v. U.S. Dep’t of the Interior*, 899 F.3d 260, 286 (4th Cir. 2018) (identifying *Chevron* as a standard of review); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 508 (2d Cir. 2017) (holding that an agency rule “satisfies *Chevron*’s deferential standard of review”); see also HARRY T. EDWARDS & LINDA A. ELLIOT, *FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS* 136 (3d ed. 2018) (listing *Chevron*’s two steps among the standards of review for agency actions).

<sup>97</sup> See, e.g., *Uniloc 2017 LLC v. Hulu, LLC*, 966 F.3d 1295, 1300–01 (Fed. Cir. 2020); *United Parcel Serv., Inc. v. Postal Regulatory Comm’n*, 955 F.3d 1038, 1047–48 (D.C. Cir. 2020); *Amezcu-Preciado v. U.S. Att’y Gen.*, 943 F.3d 1337, 1341 (11th Cir. 2019); *Tilija v. Att’y Gen. U.S.*, 930 F.3d 165, 170 (3d Cir. 2019); *Matthews v. Barr*, 927 F.3d 606, 612 (2d Cir. 2019), *cert. denied*, No. 19-1022, 2020 WL 3492659 (2020).

<sup>98</sup> See, e.g., Brief for Respondents at 27, *Mass. Dep’t of Telecomms. & Cable v. FCC*, No. 19-2282 (1st Cir. July 15, 2020), 2020 WL 4435348, at \*27; Petitioner’s Opening Brief at 33–36, *Bahr v. Wheeler*, No. 20-70092 (9th Cir. May 29, 2020), 2020 WL 3002214, at \*33–36; Response Brief for the Secretary of Labor at 16–18, *Leiva v. Admin. Review Bd.*, No. 19-60524 (5th Cir. Nov. 4, 2019), 2019 WL 5784846, at \*16–18; Brief for Respondent Federal Labor Relations Authority at 24, *Antilles Consol. Educ. Ass’n v. FLRA*, No. 19-1111 (D.C. Cir. Nov. 1, 2019), 2019 WL 5683912, at \*24.

<sup>99</sup> See, e.g., Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. § 2(3) (2016).

<sup>100</sup> See EDWARDS & ELLIOT, *supra* note 96, at 3.

<sup>101</sup> Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 15 (1994) (emphasis removed).

<sup>102</sup> EDWARDS & ELLIOT, *supra* note 96, at 3.

decisions emanating from district courts”<sup>103</sup> or, in other words, “the degree to which circuit courts will defer to the decisions of district judges.”<sup>104</sup>

Unlike rules of decision, standards of review do not dictate how courts should decide disputed questions of legal rights, obligations, or consequences.<sup>105</sup> Instead, they are attitudinal, offering relative conceptions regarding just “how wrong” a lower tribunal must be to warrant reversal.<sup>106</sup> To the extent that they call upon appellate judges to give way to the decisions of trial judges, however, these standards reflect “legislative and common-law allocations of decisional authority between” the two.<sup>107</sup> In addition, standards of review “describe the relevant and appropriate materials the appellate court looks to in performing its review function”—e.g., whether the reviewer should consider the whole record.<sup>108</sup>

In the administrative law context, courts review the decisions and actions of government agencies rather than those of lower courts. The Administrative Procedure Act<sup>109</sup> and certain organic statutes<sup>110</sup> add the arbitrary and capricious standard and the substantial evidence standard to the lexicon, for example.<sup>111</sup> Regardless, the basic concept is the same. These standards represent “the kind of scrutiny which a [c]ourt of [a]ppeals must give,”<sup>112</sup> or “how closely the federal courts may scrutinize agency decisionmaking.”<sup>113</sup>

### 1. *Strength in Indeterminacy*

Standards of review are usually “easier to describe than to define.”<sup>114</sup> Ultimately, labels like “abuse of discretion,” “clearly erroneous,” “substantial evidence,” and “arbitrary and capricious” say little about how a court will

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 4–5; see also 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* § 1.01, at 1-2 to 1-4 (4th ed. 2010) (describing standards of review similarly in terms of scrutiny and deference).

<sup>105</sup> See discussion *supra* notes 33–42 and accompanying text (describing rules of decision in these terms).

<sup>106</sup> Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 235 (2009).

<sup>107</sup> EDWARDS & ELLIOT, *supra* note 96, at 3.

<sup>108</sup> CHILDRESS & DAVIS, *supra* note 104, § 1.01, at 1-3.

<sup>109</sup> 5 U.S.C. § 706(2) (2012).

<sup>110</sup> See, e.g., 5 U.S.C. § 7703(c) (2012); 29 U.S.C. § 660(a) (2012); 30 U.S.C. § 816(a)(1) (2012); 38 U.S.C. § 7261(a) (2012).

<sup>111</sup> EDWARDS & ELLIOT, *supra* note 96, at 136. Edwards and Elliot add the *Chevron* doctrine to the list of administrative law standards of review. *Id.* But as this Article demonstrates, that categorization is not universal.

<sup>112</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951).

<sup>113</sup> EDWARDS & ELLIOT, *supra* note 96, at 136.

<sup>114</sup> Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 232 (1991).

proceed to apply the standards those labels represent.<sup>115</sup> Hence, standards of review often come with a deceptively uniform boilerplate of “talismatic” words that courts faithfully recite (and purport to apply), giving the false appearance of uniformity across cases.<sup>116</sup> The boilerplate is an important first step of communicating the degree of scrutiny a reviewing court should apply, and it can help both the court and the litigants structure and frame their legal arguments, but it offers nothing remotely resembling bright lines to govern judicial decisionmaking.<sup>117</sup>

The elusiveness of clear definitions or guidelines leads to considerable variation and inconsistency in how courts apply standards of review. On the other hand, that inconsistency, while the target of much criticism,<sup>118</sup> may actually contribute to the strength of a standard of review.<sup>119</sup>

Certainly this was the view of Justice Frankfurter in the *Universal Camera* case.<sup>120</sup> That decision involved the parameters of the substantial evidence standard for judicial review of agency factual findings, rather than *Chevron*.<sup>121</sup> Regardless, courts frequently cite Justice Frankfurter’s description of the substantial evidence standard as requiring “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>122</sup> Justice Frankfurter recognized that the inherent indeterminacy of such language led to “inevitably variant applications” that “in due course bred criticism.”<sup>123</sup> But far from eschewing that indeterminacy, Justice Frankfurter embraced it. He described standards of review as “mood[s]” that “can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of

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<sup>115</sup> See, e.g., CHILDRESS & DAVIS, *supra* note 104, § 1.01, at 1–2 (describing standards of review as “yardstick phrases” that “are not self-actualizing”).

<sup>116</sup> See, e.g., Kunsch, *supra* note 101, at 12 (suggesting that courts invoke standards of review “talismantically” and “to create an illusion of harmony between the appropriate result and the applicable law”).

<sup>117</sup> See, e.g., Peters, *supra* note 106, at 248–49 (explaining how ambiguity “gives a judge only a vague understanding of the boundaries each standard of review imposes”).

<sup>118</sup> See, e.g., Todd J. Bruno, *Say What?? Confusion in the Courts Over What Is the Proper Standard of Review for Hearsay Rulings*, 18 SUFFOLK J. TRIAL & APP. ADVOC. 1, 17 (2013) (complaining that “standards of review are anything but self-defining and self-applying” and that they “propagate[] judicial confusion”); Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 37–38 (2004) (suggesting that courts “employ[] standards of review as substitutes for analysis”).

<sup>119</sup> See, e.g., Kunsch, *supra* note 101, at 13 (“The main point is that standards of review are and should be flexible.”).

<sup>120</sup> See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

<sup>121</sup> See generally *id.* For further consideration, see also 5 U.S.C. § 706(2)(E) (2012).

<sup>122</sup> *Universal Camera*, 340 U.S. at 477 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The case is also known for its holding that a reviewing court applying the substantial evidence standard should consider the whole agency record rather than merely cherry-picking the evidence that supports the agency’s view. *Id.* at 487–88.

<sup>123</sup> *Id.* at 477.

applications. Enforcement of such broad standards implies subtlety of mind and solidity of judgment.”<sup>124</sup> Continuing the thought, he offered,

A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work. . . . There are no talismanic words that can avoid the process of judgment.<sup>125</sup>

## 2. Chevron’s Flexibility

At least at a superficial level, *Chevron* carries many of the trappings of a standard of review. Courts and commentators frequently refer to it as a standard of review.<sup>126</sup> Courts and parties recite the *Chevron* standard in the “standard of review” sections of briefs and judicial opinions.<sup>127</sup> Many proposals for eliminating *Chevron* involve replacing the doctrine with de novo review, which is certainly a standard of review.<sup>128</sup>

Delving beneath that surface, like other standards of review, *Chevron* has a deceptively uniform boilerplate statement with two steps focused first on statutory clarity and second on reasonableness.<sup>129</sup> In case after case, the Supreme Court has introduced its application of *Chevron* in such terms, whether

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<sup>124</sup> *Id.* at 487; *see also* *Demer v. IBM Corp. Ltd. Plan*, 835 F.3d 893, 913 (9th Cir. 2016) (Bybee, J., concurring) (discussing Justice Frankfurter’s mood characterization); 3 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* § 15.01, at 15-1 to 15-2 (4th ed. 2010) (discussing the same).

<sup>125</sup> *Universal Camera*, 340 U.S. at 488–89.

<sup>126</sup> *See, e.g., Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 58 (2011) (describing a situation in which “*Chevron* provided the appropriate standard of review”); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 508 (2d Cir. 2017) (holding that an agency rule “satisfies *Chevron*’s deferential standard of review”); *Global Tel\*Link v. FCC*, 866 F.3d 397, 407 (D.C. Cir. 2017); *see also* EDWARDS & ELLIOTT, *supra* note 96, at 136 (listing *Chevron*’s two steps among the standards of review for agency actions); Nicholas R. Bednar, *The Clear-Statement Chevron Canon*, 66 DEPAUL L. REV. 819, 823 (2017); West, *supra* note 50, at 661.

<sup>127</sup> *See supra* notes 97 & 98 (citing examples).

<sup>128</sup> *See, e.g., Separation of Powers Restoration Act of 2016*, H.R. 4768, 114th Cong. § 2(3) (2016).

<sup>129</sup> *See* discussion *supra* notes 2–8 and accompanying text (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and summarizing *Chevron*’s two steps).

it ultimately deferred to the agency<sup>130</sup> or not.<sup>131</sup> In *City of Arlington v. FCC*, the Court even described its recitation of *Chevron*'s two steps as "that case's now-canonical formulation."<sup>132</sup>

In other work, one of us has argued that the *Chevron* label and its two-step boilerplate represent a doctrine that is applied much more flexibly to accommodate a variety of interpretive methods and tools.<sup>133</sup> Judges will of course disagree about what methods or tools are eligible for consideration at step one or when a statutory term is ambiguous. Some have treated *Chevron*'s first step as a threshold inquiry into whether the text of a statute entirely forecloses a proposed meaning.<sup>134</sup> Others conduct a more robust step one inquiry that incorporates a comprehensive review of statutory text, purpose, legislative history, and substantive canons.<sup>135</sup> In the face of arguably inconsistent Supreme Court precedent, the federal circuit courts are divided over whether legislative history may be considered at step one or must be postponed until step two.<sup>136</sup> Many of these differences are attributable not to different visions of *Chevron* but to different interpretive methodologies. The variation persists into *Chevron*'s second step, where some judges have focused their reasonableness inquiry on the statutory text, history, and purpose<sup>137</sup> while others have blended other factors into their analysis.<sup>138</sup>

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<sup>130</sup> See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 296, 307 (2013) (outlining and analyzing the case according to *Chevron*'s two steps before deferring to the agency's interpretation); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 665–66 (2007) (same); *Barnhart v. Walton*, 535 U.S. 212, 217–18, 222 (2002) (same); *Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 417–18 (1992) (same).

<sup>131</sup> See, e.g., *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124–25 (2016) (reciting *Chevron*'s two steps before declining to defer) (subsequent history omitted); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 160 (2000) (same).

<sup>132</sup> *City of Arlington*, 569 U.S. at 296.

<sup>133</sup> Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1446 (2017).

<sup>134</sup> See, e.g., *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45 (2002) (holding that a statute is ambiguous because it "does not foreclose" the agency's interpretation).

<sup>135</sup> See Scalia, *supra* note 9, at 521 ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists.").

<sup>136</sup> Compare, e.g., *Sierra Club v. U.S. EPA*, 793 F.3d 656, 665 (6th Cir. 2015) (listing legislative history among the "traditional tools" to be considered at *Chevron*'s first step), and *BNSF Ry. Co. v. United States*, 775 F.3d 743, 755 (5th Cir. 2015) (considering legislative history as part of step one analysis), with *United States v. Geiser*, 527 F.3d 288, 292–94 (3d Cir. 2008) ("[L]egislative history should not be considered at *Chevron* step one."), and *Coyomani-Cielo v. Holder*, 758 F.3d 908, 914 (7th Cir. 2014) (acknowledging that "some of our sister circuits consider legislative history at [*Chevron* step one], but we prefer to save that inquiry for *Chevron*'s second step") (citation omitted).

<sup>137</sup> See, e.g., *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 386–92 (1999).

<sup>138</sup> See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124–26 (2016) (declining *Chevron* deference for agency inconsistency) (subsequent history omitted); *Michigan v. EPA*, 135 S. Ct. 2699, 2706–07 (2015) (blending *Chevron* and *State Farm* reasoned decisionmaking analysis).

Courts and scholars have advanced several competing versions of what *Chevron* requires.<sup>139</sup> The decision tree model derived from multiple Supreme Court decisions and described above is one example.<sup>140</sup> By comparison, Justice Breyer favors a much looser approach to *Chevron* that blends its assumptions about congressional delegations of interpretive power<sup>141</sup> and statutory text, history, and purpose with a variety of other factors.<sup>142</sup> Academic commentators have suggested that *Chevron* really only has one step,<sup>143</sup> that the traditional two steps should be reversed,<sup>144</sup> or that *State Farm*'s reasoned decisionmaking analysis should be incorporated into *Chevron* step two.<sup>145</sup>

All of these variations of *Chevron* share a basic premise: that strong, though not unquestioning, judicial deference is warranted for some subset of agency statutory interpretations because of a legislative decision to confer some amount of policymaking discretion on the agency tasked with implementing statutory requirements.<sup>146</sup> All of *Chevron*'s variations acknowledge the doctrine's two

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<sup>139</sup> Bednar & Hickman, *supra* note 133, at 1418–42 (summarizing several competing interpretations of *Chevron* advanced by legal scholars and in Supreme Court opinions).

<sup>140</sup> See discussion *supra* notes 61–83 and accompanying text.

<sup>141</sup> See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (explaining *Chevron* deference by reference to express and implicit delegations from Congress of authority to elucidate statutory meaning); see also *United States v. Mead Corp.*, 533 U.S. 218, 226–29 (2001) (premising *Chevron* deference on congressional delegations of interpretive authority).

<sup>142</sup> See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 308–11 (2013) (Breyer, J., concurring in part) (discussing and relying on different factors); *Barnhart v. Walton*, 535 U.S. 212, 221–22 (2002) (emphasizing the interpretation's longevity and listing other potentially relevant factors); *Christensen v. Harris Cty.*, 529 U.S. 576, 596–97 (2000) (Breyer, J., dissenting) (suggesting that *Chevron* only added an additional factor of congressional delegation to the traditional, multi-factor *Skidmore* analysis); see also Hickman, *supra* note 44, at 541–42 (describing Justice Breyer's approach as like a “word cloud”).

<sup>143</sup> See Stephenson & Vermeule, *supra* note 11, at 599.

<sup>144</sup> Richard M. Re, *Should Chevron Have Two Steps?*, 89 IND. L.J. 605, 619 (2014).

<sup>145</sup> See, e.g., Levin, *supra* note 10, at 1266–79; Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 129–30 (1994).

<sup>146</sup> The most common term for this premise is delegation. See, e.g., *Mead Corp.*, 533 U.S. at 226–27 (holding that eligibility for *Chevron* deference turns on a congressional delegation of authority to act with the force of law). Justice Scalia objected to the delegation terminology. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1005, 1014–20 (2005) (Scalia, J., dissenting); *Mead Corp.*, 533 U.S. at 239, 241–45 (Scalia, J., dissenting). But Justice Scalia also acknowledged that “[a]n ambiguity in a statute committed to agency implementation” sometimes means that “Congress . . . meant to leave its resolution to the agency,” which many would find indistinguishable from delegation. Scalia, *supra* note 9, at 516; see also Bednar & Hickman, *supra* note 133, at 1443 (elaborating this idea). Current debates over the constitutionality of such delegations are beside the point. See generally, e.g., *Gundy v. United States*, 139 S. Ct. 2116 (2019). If a delegation is unconstitutional, then *Chevron* deference obviously would be unavailable to interpretations adopted pursuant to that delegation. Cf. Bednar & Hickman, *supra* note 133,

steps as its boilerplate description, even if from there they argue for more or fewer steps in actual application.<sup>147</sup> And all of *Chevron*'s variations accept its call for judges to engage in some application of traditional tools of statutory construction to evaluate statutory meaning.<sup>148</sup>

Beyond that, however, the many variations of *Chevron* diverge in innumerable different directions. Yet none of the variations are demonstrably incorrect, all are theoretically defensible, and all find support in opinions of the Supreme Court.<sup>149</sup> *Chevron* is capacious enough to accommodate them all.

### C. Canon of Construction

A growing body of scholarship classifies *Chevron* itself as a “canon of construction.”<sup>150</sup> The phrase generally refers to a broad collection of linguistic and substantive principles that judges might apply to resolve statutory interpretation questions.<sup>151</sup> Canons fall into subcategories that reflect the differences in their origins and purposes. Semantic canons reflect widely held understandings about grammar and usage and are based on the premise that those common principles inform how one reads statutory text.<sup>152</sup> Substantive canons also help judges resolve statutory ambiguities, but reflect policy goals and value judgments rather than shared understandings about language.<sup>153</sup> Some

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at 1453–56 (arguing that *Chevron* deference, or something like it, is inevitable so long as the Court accepts congressional delegation of policymaking discretion).

<sup>147</sup> See, e.g., Bednar & Hickman, *supra* note 133, at 1418–42.

<sup>148</sup> See *id.*

<sup>149</sup> See *id.*

<sup>150</sup> See, e.g., WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 417–18 (2016) (describing *Chevron* as an “extrinsic source canon”); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 618–19 (1992) (describing *Chevron* as a substantive canon); Kavanaugh, *supra* note 9, at 2118 (listing *Chevron* alongside constitutional avoidance and reliance on legislative history as methods of resolving statutory ambiguity); Raso & Eskridge, Jr., *supra* note 62, at 1765–66 (concluding that the Supreme Court treats *Chevron* more like a canon than as binding precedent); see also generally Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125 (2019) (comparing *Chevron* to other “interpretive methodologies”).

<sup>151</sup> Eskridge, Jr. & Frickey, *supra* note 42, at 65–67.

<sup>152</sup> See, e.g., Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 924–25 (2013) (describing semantic canons); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1022–23 (2015) (same); cf. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 51 (2012) (“Most of the canons of interpretation . . . are not ‘rules’ of interpretation in any strict sense but presumptions about what an intelligently produced text conveys.”).

<sup>153</sup> See, e.g., Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 179–81 (2018) (contrasting “language” (semantic) canons and substantive ones); Walker, *supra* note 152, at 1031 (describing substantive canons); see also, e.g., Gluck & Bressman, *supra* note 152, at 924 (same).



scholars recognize a third category of “extrinsic canons” that concern when judges might consult “outside sources”—extratextual material including but not limited to legislative history.<sup>154</sup>

Canons typically consist of a trigger and response. For example, under the well known *ejusdem generis* canon, the trigger typically is a list of covered items accompanied by an ambiguous catchall term, and the response is to interpret that catchall term to include only those things that are “like” the other items in the list.<sup>155</sup> For the rule of lenity, arguably much like *Chevron*, the trigger is ambiguity in a criminal statute, and the response is to interpret that ambiguity in the defendant’s favor.<sup>156</sup>

Some substantive canons are clear statement rules, requiring Congress to signal its intentions clearly before the courts will apply the canon.<sup>157</sup> But a number of substantive canons are ambiguity tie breakers.<sup>158</sup> And when the application of a substantive canon turns on an amorphous finding like “ambiguity,” the trigger may be somewhat difficult to establish.<sup>159</sup> Regardless, once a court has identified the trigger, a canon’s utility lies in its ease of application.

A single canon rarely provides the sole basis for a judicial decision, and canons usually appear in combination with one another in justifying an

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<sup>154</sup> See, e.g., Gluck & Bressman, *supra* note 152, at 924–25; Noah B. Lindell, *The Dignity Canon*, 27 CORNELL J.L. & PUB. POL’Y 415, 431 (2017); Philip A. Talmadge, *A New Approach to Statutory Interpretation in Washington*, 25 SEATTLE U. L. REV. 179, 196–99 (2001).

<sup>155</sup> See, e.g., Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 384–85 (2003); Gooch v. United States, 297 U.S. 124, 128 (1936); cf. Yates v. United States, 574 U.S. 528, 543–46 (2015) (discussing and applying the *ejusdem generis* canon along with the “similar” *noscitur a sociis* canon); Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or., 515 U.S. 687, 720–21 (1995) (Scalia, J., dissenting) (“I would call it *noscitur a sociis*, but the principle is much the same: The fact that several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well”) (internal quotation marks omitted). But see Harrison v. PPG Indus., 446 U.S. 578, 587–89 (1980) (describing limitations of the *ejusdem generis* canon and declining to apply it).

<sup>156</sup> See, e.g., Moskal v. United States, 498 U.S. 103, 107–08 (1990).

<sup>157</sup> See, e.g., Eskridge, Jr. & Frickey, *Quasi-Constitutional Law*, *supra* note 150, at 611–12; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 121–26 (2001).

<sup>158</sup> See, e.g., Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117–19 (2010) (describing types of canons); Brian G. Slocum, *Overlooked Temporal Issues in Statutory Interpretation*, 81 TEMP. L. REV. 635, 665 (2008) (discussing canons as ambiguity tie breakers).

<sup>159</sup> Muscarello v. United States, 524 U.S. 125, 138 (1998) (“The simple existence of some statutory ambiguity, however, is not sufficient to warrant application of [the rule of lenity], for most statutes are ambiguous to some degree.”); Kavanaugh, *supra* note 9, at 2118 (“[J]udges often cannot make [the] initial clarity versus ambiguity decision in a settled, principled, or evenhanded way.”); see also Slocum, *supra* note 158, at 665 (describing tie-breaker canons as “[t]he weakest substantive canons”).

interpretive result.<sup>160</sup> Especially when a substantive canon serves as an ambiguity tie breaker, courts usually exhaust other interpretive tools before turning to the canon.<sup>161</sup> Consequently, judges rarely consider themselves bound to apply a particular canon, particularly when they can resolve the interpretive question in some other way.<sup>162</sup>

### 1. *Chevron as a Substantive Canon*

Categorizing *Chevron* as a substantive canon of construction has a certain intuitive appeal. *Chevron* is predicated on certain understandings and assumptions regarding interbranch relationships and congressional intent as conveyed through express and implied delegations to agencies of the authority to act with the force and effect of law.<sup>163</sup> Courts often employ it in conjunction with other canons;<sup>164</sup> indeed, the *Chevron* decision itself instructed courts to do so.<sup>165</sup> The Supreme Court thus has expressly styled *Chevron* with many of the trappings of a substantive canon—instructing reviewing courts to apply other interpretive tools to discern statutory meaning and congressional intent first, and then in the face of ambiguity, telling them which side should win. Framing *Chevron* as a substantive canon maintains much of the doctrine's substance and merely replaces the rhetoric of deference with that of ambiguity tie breakers, clear statement rules, and presumptions.

To that end, legal scholars have offered competing articulations of *Chevron* as a substantive canon. Cass Sunstein summarized it in one sentence: “[i]n the face of ambiguity, statutes mean what the relevant agency takes them to mean.”<sup>166</sup> He described *Chevron* as “the quintessential prodelegation canon,”

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<sup>160</sup> See Raso & Eskridge, Jr., *supra* note 62, at 1734–35.

<sup>161</sup> See, e.g., *Muscarello*, 524 U.S. at 138 (“The rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended.”) (quoting *United States v. Wells*, 519 U.S. 482, 499 (1997)) (internal quotation marks and ellipses omitted); *Moskal*, 498 U.S. at 108 (“Instead, we have always reserved lenity for those situations in which a reasonable doubt persists about a statute’s intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute.”) (internal quotations omitted).

<sup>162</sup> See Gluck & Posner, *supra* note 18, at 1334 (reporting that most judges did not feel bound to use particular canons).

<sup>163</sup> See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (expressly basing *Chevron* deference on the agency’s delegated authority to act with the force of law); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44, 865–66 (1984).

<sup>164</sup> See, e.g., *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594–600 (2004); *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687, 694, 697, 707–08 (1995); *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 610–14 (1991); *Humane Soc’y of U.S. v. Locke*, 626 F.3d 1040, 1054–55 (9th Cir. 2010).

<sup>165</sup> *Chevron*, 467 U.S. at 843 n.9.

<sup>166</sup> Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 329 (2000); see also Eskridge, Jr. & Frickey, *supra* note 150, at 618–19 (providing a substantially similar framing of the *Chevron* canon: “Unless refuted by the clear language of the statute, a court must defer to [an] agency interpretation”).

noting that *Chevron* incorporates a presumption that ambiguity is a delegation of interpretive power to agencies rather than to courts.<sup>167</sup> Nicholas Bednar, expanding on earlier work by William Eskridge and Philip Frickey,<sup>168</sup> has framed the *Chevron* canon more forcefully as a clear statement rule: “[u]nless refuted by the clear language of the statute, a court must defer to an agency interpretation.”<sup>169</sup> Like other substantive canons, *Chevron* creates a presumption of congressional intent that arises in the face of textual silence or ambiguity.<sup>170</sup> The constitutional avoidance canon, for example, does something similar in the case of an ambiguity that raises a serious constitutional question.<sup>171</sup>

Substantive canons implement values.<sup>172</sup> Viewing *Chevron* as a substantive canon, one can reframe the doctrine’s traditional justifications as the values that the *Chevron* canon promotes. The Court itself has justified *Chevron* in terms of superior agency subject matter expertise and democratic legitimacy, in addition to its presumption that Congress signals a preference for agencies to resolve statutory gaps when it delegates policymaking authority to agencies.<sup>173</sup> Cass Sunstein has suggested also that *Chevron* is a statement about the allocation of government power, “defin[ing] a cluster of ideas about who is entrusted with interpreting ambiguous statutes.”<sup>174</sup> As a canon of statutory construction, *Chevron* transforms these animating principles into just another tool for resolving statutory meaning.

## 2. The Chevron Canon in Practice

In practice, some Justices have approached *Chevron* deference to agency interpretations of statutes as they would any other canon—i.e., as one of several factors or elements supporting an interpretive result. Consistent with the notion

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<sup>167</sup> Sunstein, *supra* note 166, at 329.

<sup>168</sup> Eskridge, Jr. & Frickey, *supra* note 150, at 618–19.

<sup>169</sup> Bednar, *supra* note 126, at 822.

<sup>170</sup> West, *supra* note 50, at 658.

<sup>171</sup> See *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (stating that, where multiple plausible interpretations exist, the avoidance canon rests “on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts”).

<sup>172</sup> See Eskridge, Jr. & Frickey, *supra* note 150, at 595 (describing substantive canons as “clear statement rules or presumptions of statutory interpretation that reflect substantive values drawn from the common law, federal statutes, or the United States Constitution”).

<sup>173</sup> See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629–30 (2018) (emphasizing democratic accountability as well as delegation as justifications for *Chevron*); *Negusie v. Holder*, 555 U.S. 511, 531 (2009) (Stevens, J., concurring) (“Certain aspects of statutory interpretation . . . are properly understood as delegated by Congress to an expert and accountable administrative body.”); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (noting that agency expertise counsels in favor of deference); *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (describing *Chevron* as premised on a congressional delegation theory); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (justifying *Chevron* on all three grounds).

<sup>174</sup> Sunstein, *Law and Administration after Chevron*, *supra* note 73, at 2075.

that courts are not bound to preference one canon over another, the Court often has applied *Chevron* “episodically and not entirely predictably.”<sup>175</sup> Empirical analysis by William Eskridge and Lauren Baer documented the Court’s failure to mention *Chevron* at all in a little more than half of the cases between 1984 and 2006 in which it might have done so.<sup>176</sup>

Subsequent research by Connor Raso and William Eskridge separately identified several trends in *Chevron*’s application that they associated with canons of construction.<sup>177</sup> One was the Justices’ application of *Chevron* “episodically and not entirely predictably,” which prompts them to characterize *Chevron* as a “flexible rule[] of thumb or presumption[]” that a Justice may or may not apply.<sup>178</sup> Second, they note that individual Justices apply *Chevron* in idiosyncratic ways based on “each Justice’s particular normative vision”<sup>179</sup>—notably a characteristic we also associate with *Chevron* as a standard of review.<sup>180</sup> According to Raso and Eskridge, however, the Court’s frequent failure to mention *Chevron* where it applies demonstrates that the Court does not apply *Chevron* even when it appears applicable.<sup>181</sup>

To support their characterization, Raso and Eskridge offer the useful example of *Smith v. City of Jackson*.<sup>182</sup> In that case, the Justices divided over how to approach an Equal Employment Opportunity Commission (EEOC) interpretation that the Age Discrimination in Employment Act (ADEA) permitted recovery for disparate impact claims.<sup>183</sup> In an opinion for a plurality of the Court, Justice Stevens analyzed the text and history of the ADEA to conclude that disparate impact claims were permitted, but failed to mention *Chevron*.<sup>184</sup> The EEOC’s consistent interpretation provided further support for the Court’s conclusion but appeared to have little to no bearing on the Court’s analysis.<sup>185</sup>

Justice Breyer’s dissent in *SAS Institute v. Iancu* is a more recent example.<sup>186</sup> Citing *Chevron*’s two-step framework up front, Justice Breyer then examined the statutory text, structure, and purposes—as well as the practical implications of the majority’s holding—to conclude that the inter partes review

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<sup>175</sup> Raso & Eskridge, Jr., *supra* note 62, at 1734, 1766.

<sup>176</sup> See Eskridge, Jr. & Baer, *supra* note 84, at 1089–90 (“[F]rom the time it was handed down until the end of the 2005 term, *Chevron* was applied in only 8.3% of Supreme Court cases evaluating agency statutory interpretations [and] in the majority of [those] cases—53.6% of them—the Court does not apply any deference regime at all.”).

<sup>177</sup> See generally Raso & Eskridge, Jr., *supra* note 62.

<sup>178</sup> *Id.* at 1766.

<sup>179</sup> *Id.*

<sup>180</sup> See discussion *supra* notes 114–25 and accompanying text.

<sup>181</sup> Raso & Eskridge, Jr., *supra* note 62, at 1740 (citing Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 982–84 (1992)).

<sup>182</sup> *Id.* at 1729 (citing *Smith v. City of Jackson*, 544 U.S. 228 (2005)).

<sup>183</sup> *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005).

<sup>184</sup> See generally *id.*

<sup>185</sup> *Id.* at 239–40.

<sup>186</sup> See *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1360 (2018) (Breyer, J., dissenting).

statute was ambiguous as to whether the Patent Office could limit its review to only certain challenged patent claims.<sup>187</sup> Justice Breyer then returned to *Chevron*:

In referring to *Chevron*, I do not mean that courts are to treat that case like a rigid, black-letter rule of law, instructing them always to allow agencies leeway to fill every gap in every statutory provision. Rather, I understand *Chevron* as a rule of thumb, guiding courts in an effort to respect that leeway which Congress intended the agencies to have. I recognize that Congress does not always consider such matters, but if not, courts can often implement a more general, virtually omnipresent congressional purpose—namely, the creation of a well-functioning statutory scheme—by using a canon-like, judicially created construct, the hypothetical reasonable legislator, and asking what such legislators would likely have intended had Congress considered the question of delegating gap-filling authority to the agency.<sup>188</sup>

Applying this understanding, Justice Breyer concluded that the statute’s complexity and “the consequent need for agency expertise and administrative experience” counseled in favor of deference.<sup>189</sup>

Separately, in documenting *Chevron*’s effect on Congress, Abbe Gluck and Lisa Schultz Bressman also have concluded that *Chevron* operates as a canon, which they label as “deliberation-forcing.”<sup>190</sup> According to Gluck and Bressman, while *Chevron* does not necessarily reflect linguistic norms under which both courts and Congress may operate, as is the case with some other canons, *Chevron* nevertheless reminds statute drafters of the “consequences of ambiguity.”<sup>191</sup> Similarly, *Chevron* may create expectations in drafters of both statutes and regulations for how a court will resolve interpretive questions in the face of ambiguity and delegation of policymaking power.<sup>192</sup> The more those expectations are tested and confirmed through the iterative process of drafting and judicial review, the more they will become reliable predictors of statutory and regulatory meaning.

### III. WHY DO WE CARE?

Most cases in which courts contemplate *Chevron* can be resolved without digging too deeply into the doctrine’s nuances. In many cases, the reviewing

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<sup>187</sup> *Id.* at 1360–64.

<sup>188</sup> *Id.* at 1364 (citation omitted).

<sup>189</sup> *Id.* at 1364–65 (quoting *Barnhart v. Walton*, 535 U.S. 212, 225 (2002)).

<sup>190</sup> Gluck & Bressman, *supra* note 152, at 996.

<sup>191</sup> *Id.*

<sup>192</sup> *See id.*; Walker, *supra* note 152, at 1007 (reporting that agency regulation drafters are “well aware of the *Chevron* deference standard”); *cf.* *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 503 (2012) (Kennedy, J., dissenting) (“Our legal system presumes there will be continuing dialogue among the three branches of Government on questions of statutory interpretation and application.”).

court decides that *Chevron* obviously does not apply because the agency action in question obviously lacks the force of law so is ineligible for *Chevron* deference on that basis.<sup>193</sup> In other cases, the Court simply decides the meaning of the statute is clear, signaling that the outcome would be the same with or without *Chevron*, and thereby avoiding any question of deference.<sup>194</sup> With some regularity, courts volunteer that they would resolve the case one way or the other irrespective of deference doctrine and without deciding whether *Chevron* or any other such doctrine might otherwise apply.<sup>195</sup> In all such cases, how one categorizes *Chevron* is probably irrelevant.

Sometimes, however, disagreements over how to think about the *Chevron* doctrine cannot be avoided. In such cases, courts need more of a theoretical framework for thinking about *Chevron*'s nuances. In recent years, two such issues have become particularly salient. One is an emerging disagreement among the circuit courts over whether or under what circumstances the government can waive or forfeit its eligibility for *Chevron* deference. The other is the substantially more fundamental question whether the Supreme Court should overrule *Chevron* altogether as incompatible with and an abdication of the judiciary's constitutional role.

#### A. Waiving Chevron

In our adversarial judicial system, failing to make certain arguments—to assert rights or privileges—on a timely basis may prevent a litigant from obtaining judicial review of those arguments at all.<sup>196</sup> Not every argument can

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<sup>193</sup> See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006); *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 487–88 (2004); *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001); *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000).

<sup>194</sup> See, e.g., *Pereira v. Sessions*, 138 S. Ct. 2105, 2113–14 (2018); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017); *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2040 (2012); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 462 (2002).

<sup>195</sup> See *Freeman*, 132 S. Ct. at 2040; *Indian River Cty. v. U.S. Dep't of Transp.*, 945 F.3d 515, 531 (D.C. Cir. 2019), *cert. denied*, No. 19-1304, 2020 WL 5882262 (2020); *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 220 (2d Cir. 2014); *Del. Dep't of Nat. Res. & Env't Control v. U.S. Army Corps of Eng'rs*, 685 F.3d 259, 284 n.25 (3d Cir. 2012); see also Frederick Liu, *Chevron as a Doctrine of Hard Cases*, 66 ADMIN. L. REV. 285, 335 n.302 (2014) (“Put differently, when the statute’s meaning is clear, the choice among *Chevron*, *Skidmore*, or some other standard is moot—which probably explains why, in the majority of cases the Court hears in which an agency construction is available, the Court declines to invoke any deference regime whatsoever.”).

<sup>196</sup> See, e.g., *Yakus v. United States*, 321 U.S. 414, 444 (1944) (“No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.”); see also, e.g., *Stern v. Marshall*, 564 U.S. 462, 482 (2011) (making the same point and rejecting an argument as forfeited); *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 894–95 (1991) (Scalia, J., concurring in part and concurring in the judgment) (discussing forfeiture and reasons for it); CATHERINE T. STRUVE, 16AA

be waived or forfeited in this manner. For that matter, waiver and forfeiture are similar but not precisely the same. Waiver involves the “intentional relinquishment” of a right or privilege,<sup>197</sup> while forfeiture involves the failure—whether intentional or not—to pursue a right or privilege by raising it in court.<sup>198</sup> While courts may revive forfeited claims in the interest of justice,<sup>199</sup> a claim that is waived generally is waived for good.<sup>200</sup> Conversely, “[a] right that cannot be waived [also] cannot be forfeited.”<sup>201</sup>

A strand of cases and commentary has emerged in recent years suggesting that an agency may waive or forfeit the eligibility of a particular agency statutory interpretation for *Chevron* deference. Sometimes the issue arises because the government has either disclaimed or failed to advocate adequately for *Chevron* deference in briefs before a reviewing court.<sup>202</sup> In other instances, the issue stems from the government’s decision not to defend the agency statutory interpretation under challenge.<sup>203</sup> Cases addressing the issue thus concern both waiver and forfeiture. As Justice Scalia once observed, the Supreme Court has often used the terms interchangeably,<sup>204</sup> and commentators generally seem to have chosen the waiver label as a shorthand for both in the *Chevron* context,<sup>205</sup> so we will do the same.

Regardless, how courts categorize *Chevron* is highly relevant for thinking about waiver questions. As we discuss below, the notion that the government

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FEDERAL PRACTICE & PROCEDURE JURIS. § 3974.1(5) (4th ed. 2020) (describing the law of waiver and forfeiture).

<sup>197</sup> *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

<sup>198</sup> *United States v. Olano*, 507 U.S. 725, 733 (1993); *see also, e.g., Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 & 17 n.1 (2017) (describing the difference between waiver and forfeiture in the context of a civil case); *Kontrick v. Ryan*, 540 U.S. 443, 458 & 458 n.13 (2004) (same).

<sup>199</sup> *Wood v. Milyard*, 566 U.S. 463, 471 n.5 (2012) (citing *Day v. McDonough*, 547 U.S. 198 (2006)) (“[A] federal court has the authority to resurrect only forfeited defenses.”).

<sup>200</sup> *United States v. Jimenez*, 512 F.3d 1, 7 (1st Cir. 2007) (“A waiver is unlike a forfeiture, for the consequence of a waiver is that the objection in question is unreviewable.”); Note, *Waiving Chevron Deference*, 132 HARV. L. REV. 1520, 1523–24 (2019) (making this observation).

<sup>201</sup> *Freytag*, 501 U.S. at 894–95 n.2 (Scalia, J., concurring in part and concurring in the judgment).

<sup>202</sup> *See, e.g., Hays Med. Ctr. v. Azar*, 956 F.3d 1247, 1264 & 1264 n.18 (10th Cir. 2020); *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 21–22 (D.C. Cir. 2019) (per curiam), *cert. denied*, 140 S. Ct. 789, 789 (2020) (mem.); *Neustar, Inc. v. FCC*, 857 F.3d 886, 893–94 (D.C. Cir. 2017); *cf. Sierra Club v. U.S. Dep’t of the Interior*, 899 F.3d 260, 286 (4th Cir. 2018) (observing that the parties in the case “seem[ed] to assume, without any analysis, that [the agency’s] interpretation of the relevant statutes is eligible for *Chevron* review” before deciding that *Chevron* is not waivable).

<sup>203</sup> *See, e.g., Glob. Tel\*Link v. FCC*, 866 F.3d 397, 407–08 (D.C. Cir. 2017).

<sup>204</sup> *Freytag*, 501 U.S. at 894–95 n.2 (Scalia, J. concurring in part and concurring on the judgment).

<sup>205</sup> *See, e.g., James Durling & E. Garrett West*, Essay, *May Chevron Be Waived?*, 71 STAN. L. REV. ONLINE 183, 183 (2019) (describing the issue in terms of waiver); Rozansky, *supra* note 27, at 1928 (same).

can waive or forfeit its claim to *Chevron* deference is plausible if *Chevron* is a rule of decision, but much less so if *Chevron* is a standard of review or a canon of construction.

### 1. *Emergence of the Chevron Waiver Argument*

Courts have long been criticized for failing to mention *Chevron* at all in cases where it would obviously seem to apply.<sup>206</sup> In their study of Supreme Court statutory interpretation cases, William Eskridge, Jr. and Lauren Baer documented that more than half of the cases decided between the *Chevron* decision and the end of the Court's 2005 term cited no deference doctrine at all and instead saw the Court resolving the case based on its own ad hoc reasoning.<sup>207</sup> Thomas Merrill, writing on his time in the Office of the Solicitor General in the early 1990s, described that office's strategic decision to push *Chevron* arguments in lower courts, where it felt they would be favorably received, but not in the Supreme Court, where it felt there was a greater risk of an anti-government ruling.<sup>208</sup> Such cases are notable, however, more for their silence regarding *Chevron*'s applicability, rather than any express claims or pronouncements regarding the government's waiver of *Chevron* deference.

As a more overt legal position, the concept of *Chevron* waiver seems to have originated in the D.C. Circuit's 2015 decision in *Lubow v. Department of State*.<sup>209</sup> The challengers and the government agreed in *Lubow* that the court should evaluate regulation at issue using the *Chevron* framework, so the court stated that it did not need to consider "potential arguments [the challengers] might have made (but did not make) against" *Chevron* deference.<sup>210</sup> In making this statement, the *Lubow* court did not explain what argument it thought might have been made.<sup>211</sup> Instead, it cited *Peter Pan Bus Lines v. Federal Motor Carrier Safety Administration*,<sup>212</sup> in which the D.C. Circuit found a statutory provision ambiguous but declined to evaluate the reasonableness of an agency's interpretation because the agency had indicated in the regulatory preamble that it believed the statute to be unambiguous.<sup>213</sup> Without further analysis, the court in *Lubow* went on to say that "[t]he applicability of the *Chevron* framework does not go to [the] court's jurisdiction, and a party therefore can forfeit an argument

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<sup>206</sup> KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.6.10, at 337 (6th ed. 2019); Eskridge, Jr. & Baer, *supra* note 84, at 1108.

<sup>207</sup> See Eskridge, Jr. & Baer, *supra* note 84, at 1100.

<sup>208</sup> See Thomas W. Merrill, *Confessions of a Chevron Apostate*, 19 ADMIN. & REG. L. NEWS, Winter 1994, at 1, 14.

<sup>209</sup> See generally *Lubow v. U.S. Dep't of State*, 783 F.3d 877 (D.C. Cir. 2015).

<sup>210</sup> *Id.* at 884.

<sup>211</sup> See generally *id.*

<sup>212</sup> *Id.* at 884 (citing *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350 (D.C. Cir. 2006)).

<sup>213</sup> *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1353–54 (D.C. Cir. 2006).



against deference by failing to raise it,” but the forfeiture issue in the case cited for that proposition concerned the Appointments Clause, not *Chevron*.<sup>214</sup>

Irrespective of whether the *Lubow* court intended its words to create a new legal argument, the D.C. Circuit appeared to extend its endorsement of *Chevron* waiver in *Neustar, Inc. v. FCC*.<sup>215</sup> The case concerned a Federal Communications Commission (FCC) informal adjudication,<sup>216</sup> which arguably may not have been eligible for *Chevron* deference in any event in light of the Supreme Court’s decision in *United States v. Mead Corp.*<sup>217</sup> On this occasion, however, the court held that the FCC had simply forfeited eligibility for *Chevron* deference by failing to argue for it expressly.<sup>218</sup> Although the FCC had asserted that “[r]eview of the FCC’s interpretation of the statutes it administers is governed by *Chevron*” and recited *Chevron*’s two steps in its brief’s separate “Standard of Review” section,<sup>219</sup> the court cited *Lubow* and held that these “nominal[] references” were insufficient to invoke *Chevron* and that the agency had “forfeited any claims to *Chevron* deference.”<sup>220</sup>

A subsequent D.C. Circuit panel walked back the *Neustar* holding a bit.<sup>221</sup> In *SoundExchange, Inc. v. Copyright Royalty Board*, the government defended a Copyright Royalty Board (CRB) interpretation of the Copyright Act adopted through formal rulemaking.<sup>222</sup> On this occasion, the government neither cited *Chevron* in its brief nor framed its arguments around *Chevron*’s two steps. But the government also did not assert de novo review. Instead, the government contended that the court should defer to the CRB unless its interpretation was “arbitrary, capricious, contrary to law, or not supported by substantial evidence.”<sup>223</sup> The court, by contrast, observed that it had “previously applied the *Chevron* framework when reviewing the [CRB’s] interpretation of the same statutory provision.”<sup>224</sup> It acknowledged that its decision in *Neustar* “held that an agency can forfeit its ability to obtain deferential review under *Chevron* by failing to invoke *Chevron* in its briefing,” but maintained that the *Neustar*

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<sup>214</sup> *Lubow*, 783 F.3d at 884 (emphasis added) (citing *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 756 (D.C. Cir. 2009) (per curiam)).

<sup>215</sup> *Neustar, Inc. v. FCC*, 857 F.3d 886, 894 (D.C. Cir. 2017).

<sup>216</sup> *Id.* at 888–89.

<sup>217</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (requiring agency action to carry the force of law to obtain *Chevron* deference); *id.* at 239 n.1 (Scalia, J., dissenting) (finding unclear whether the Court’s approach would apply to informal as well as formal adjudications).

<sup>218</sup> *Neustar*, 857 F.3d at 893–94.

<sup>219</sup> Brief for Respondents at 26–27, *Neustar, Inc. v. FCC*, 857 F.3d 886 (D. C. Cir. 2017) (No. 15-1080), 2015 WL 9250677, at \*26–27.

<sup>220</sup> *Neustar*, 857 F.3d at 894.

<sup>221</sup> *SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41, 54–55 (D.C. Cir. 2018).

<sup>222</sup> *Id.* at 45–46.

<sup>223</sup> See Final Brief for Appellees at 18, *SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41 (D.C. Cir. 2018) (No. 16-1159) (quoting *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 127 (D.C. Cir. 2015)).

<sup>224</sup> *SoundExchange*, 904 F.3d at 53–54.

opinion “did not indicate a ‘magic words’ requirement.”<sup>225</sup> The court then distinguished *Neustar* on the ground that the underlying FCC orders in that case also “show[ed] no invocation of *Chevron* deference for this matter,” and additionally recognized that the FCC’s action in *Neustar*, as an informal adjudication, might not have been eligible for *Chevron* deference in the first place.<sup>226</sup> The court then concluded that *Chevron* deference was appropriate because the CRB’s rulemaking was “the kind of interpretive exercise to which review under *Chevron* generally applies” and the agency, in acting, had both considered the statute’s text, history, purpose, and surrounding case law and asserted the reasonableness of its interpretation.<sup>227</sup>

Finally, the D.C. Circuit expressly rejected the government’s ability to waive *Chevron* review in *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, upholding a regulation banning bump stocks.<sup>228</sup> In *Guedes*, the agency invoked *Chevron* by name in its regulatory preamble.<sup>229</sup> Before the D.C. Circuit, however, the government maintained that de novo review was appropriate and that “*Chevron* plays no role in this case” with little explanation.<sup>230</sup> That litigating position did not convince the court. Here again, the court noted that the agency had advanced its interpretation in a legislative rule using notice-and-comment rulemaking, which ordinarily would mean eligibility for *Chevron* deference under *Mead*.<sup>231</sup> Although the court cited the agency’s express invocation of *Chevron* in its regulatory preamble as *further evidence* of the regulation’s legislative character, the court’s analysis makes clear that satisfaction of *Mead*’s force of law requirement *alone* was enough for the interpretation in question to be eligible for *Chevron* deference.<sup>232</sup>

To make its position even more clear, the D.C. Circuit in *Guedes* then proceeded to reject outright the possibility that an agency can either waive or forfeit *Chevron* deference for one of its actions.<sup>233</sup> The court also noted several practical and doctrinal tensions that made *Chevron* an “awkward conceptual fit for the doctrines of forfeiture and waiver.”<sup>234</sup> *Chevron*, is a “doctrine about

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<sup>225</sup> *Id.* at 54.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 54–55 (citing 81 Fed. Reg. 26,316, 26,332 (May 2, 2016)).

<sup>228</sup> *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 920 F.3d 1, 6 (D.C. Cir. 2019) (per curiam), *cert. denied*, 140 S. Ct. 789 (2020) (mem.).

<sup>229</sup> Bump-Stock-Type Devices, 83 Fed. Reg. 66,514, 66,526–27 (Dec. 26, 2018) (codified at 27 C.F.R. § 447–79 (2018)).

<sup>230</sup> Brief for Appellees at 37–38, *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1 (D.C. Cir. 2019) (per curiam) (Nos. 19-5042–19-5044), 2019 WL 1200603, at \*37.

<sup>231</sup> *Guedes*, 920 F.3d at 6, 20.

<sup>232</sup> *See id.* at 17–19.

<sup>233</sup> *Id.* at 21–22. Judge Henderson, dissenting on other grounds, declined to reach the issue of *Chevron* waiver. *See id.* at 41 n.10 (Henderson, J., dissenting).

<sup>234</sup> *Id.* at 22.

statutory meaning,” according to the court, “not a ‘right’ or ‘privilege’ belonging to a litigant.”<sup>235</sup>

Although the D.C. Circuit, after contemplation, seems to have moved away from its early embrace of *Chevron* waiver, other circuits have addressed or at least acknowledged the issue.<sup>236</sup> In *Sierra Club v. U.S. Department of the Interior*, the Fourth Circuit rejected outright *Chevron*’s waivability, labeling the doctrine a standard of review that cannot be waived and must be assessed independently by the court.<sup>237</sup> The Second Circuit in *New York v. Department of Justice* seems to have reached the opposite conclusion, noting disagreement between other circuits and interpreting the statute de novo because the government did not claim *Chevron* deference.<sup>238</sup>

The Tenth Circuit appears divided, at least for now, over the question of *Chevron*’s waivability. In *Hays Medical Center v. Azar*, that court considered whether Medicare reimbursement regulations adopted by the Department of Health and Human Services were arbitrary and capricious under the *State Farm* doctrine.<sup>239</sup> In its brief, the government attempted to recast its argument by citing *Chevron* rather than *State Farm*.<sup>240</sup> The court rejected this reframing in a long footnote in which it contended that the government’s “perfunctory and fleeting invocation of *Chevron* waives [its] argument for *Chevron* deference.”<sup>241</sup> A few weeks later, in *Aposhian v. Barr*, a different Tenth Circuit panel considered an interlocutory appeal regarding the same bump-stock regulations at stake in the *Guedes* case discussed above.<sup>242</sup> Again, the government disavowed reliance on *Chevron*, and Aposhian argued that the government consequently had waived *Chevron* deference.<sup>243</sup> A divided panel disagreed, observing that Aposhian had framed his own arguments in terms of *Chevron*’s two steps and, thus, had invited the Court to do the same.<sup>244</sup> A dissenting judge disagreed, contending that the court should respect the government’s disavowal of *Chevron* deference.<sup>245</sup> The Tenth Circuit has granted en banc review in *Aposhian* to consider, among other questions, whether

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<sup>235</sup> *Id.*

<sup>236</sup> *See, e.g., Martin v. Soc. Sec. Admin.*, 903 F.3d 1154, 1161 (11th Cir. 2018) (describing a circuit split and declining to take a position).

<sup>237</sup> *Sierra Club v. U.S. Dep’t of the Interior*, 899 F.3d 260, 286 (4th Cir. 2018).

<sup>238</sup> *New York v. U.S. Dep’t of Justice*, 951 F.3d 84, 101 & 101 n.17 (2d Cir. 2020), *rehearing denied en banc*, 964 F.3d 150 (mem.).

<sup>239</sup> *Hays Med. Ctr. v. Azar*, 956 F.3d 1247, 1250–51, 1264 (10th Cir. 2020) (citing *Judulang v. Holder*, 565 U.S. 42, 53 (2011)).

<sup>240</sup> *See* Brief for Appellee at 19, *Hays Med. Ctr. v. Azar*, 956 F.3d 1247 (10th Cir. 2020) (No. 17-3232), 2018 WL 1634055, at \*19.

<sup>241</sup> *Hays*, 956 F.3d at 1264 n.18.

<sup>242</sup> *See Aposhian v. Barr*, 958 F.3d 969, 974 (10th Cir. 2020).

<sup>243</sup> Brief for Appellees at 36, *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020) (No. 19-4036), 2019 WL 4054816, at \*36 (“Plaintiff’s discussion of deference under [*Chevron*] has no bearing on the resolution of this case.”).

<sup>244</sup> *Aposhian*, 958 F.3d at 980–82.

<sup>245</sup> *Id.* at 998 (Carson, J., dissenting).

“*Chevron* step-two deference depend[s] on one or both parties invoking it, i.e., can it be waived?”<sup>246</sup>

Finally, the Supreme Court has offered its own signals that it might be receptive to the *Chevron* waiver argument. Justice Gorsuch in particular seems to favor the idea that *Chevron* can be waived. Writing in dissent in *BNSF Railway Co. v. Loos*, Justice Gorsuch expressly noted that the party claiming the validity and support of the administering agency’s interpretation of the relevant statute “devoted scarcely any of its briefing to *Chevron*” and, at oral argument, “didn’t even mention the case until the final seconds.”<sup>247</sup> Justice Gorsuch had other problems with the agency’s interpretation in that case, calling it “an inferior interpretation of the law that may be more the product of politics than a scrupulous reading of the statute.”<sup>248</sup>

Subsequently, however, in a statement accompanying the Supreme Court’s denial of certiorari in the *Guedes* case, Justice Gorsuch expressly rejected the D.C. Circuit’s application of *Chevron*.<sup>249</sup> He contended that *Chevron* “has nothing to say about the proper interpretation of the law before us” because “the government expressly waived reliance on *Chevron*.”<sup>250</sup> He cited Eskridge & Baer among other sources in claiming that the Court “has often declined to apply *Chevron* deference when the government fails to invoke it.”<sup>251</sup>

Whether the rest of the Court favors the *Chevron* waiver argument is less clear. In *County of Maui v. Hawaii Wildlife Fund*, Justice Breyer for the Court observed that the Solicitor General had not asked for *Chevron* deference for an Environmental Protection Agency “Interpretive Statement.”<sup>252</sup> The EPA’s interpretive statement was the sort of informal, subregulatory guidance that the Supreme Court in *Mead* suggested was not eligible for *Chevron* deference in the first place.<sup>253</sup> And Justice Breyer went on to acknowledge that the Court found the agency’s interpretation “neither persuasive nor reasonable” in any event.<sup>254</sup> Further, as previously noted, Justice Breyer has always held a somewhat idiosyncratic and mushy view of *Chevron* and *Skidmore* as a single, blended, multifactor standard.<sup>255</sup> Nevertheless, his mere observation that the government had failed to argue for *Chevron* deference prompted Aaron Nielson to wonder

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<sup>246</sup> Order at 1, *Aposhian v. Barr*, 958 F.3d 969, 974 (10th Cir. 2020) (No. 19-4036), 2020 WL 5268055, \*1.

<sup>247</sup> *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 908–09 (2019) (Gorsuch, J., dissenting).

<sup>248</sup> *Id.*

<sup>249</sup> *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 789–90 (2020) (mem.) (Gorsuch, J., statement).

<sup>250</sup> *Id.* at 789.

<sup>251</sup> *Id.* at 790 (citing William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1084, 1121–24 (2008)).

<sup>252</sup> *Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020).

<sup>253</sup> *See United States v. Mead Corp.*, 533 U.S. 218, 226–27, 234 (2001).

<sup>254</sup> *Hawaii Wildlife Fund*, 140 S. Ct. at 1474.

<sup>255</sup> *See supra* note 141–42 and accompanying text.

whether the Court was holding “that *Skidmore*, rather than *Chevron*, applied when agency counsel doesn’t argue for deference.”<sup>256</sup>

## 2. Implications of Categorization for Chevron Waiver

Many judicial opinions merely hint at the possibility of *Chevron* waiver, for example in refusing to consider a belated argument that a relevant regulation itself is unreasonable or invalid,<sup>257</sup> or by suggesting that similarly-situated parties might argue that particular types of agency pronouncements are ineligible for *Chevron* review.<sup>258</sup> Most of the opinions that more clearly support *Chevron*’s waivability offer little analysis as to *why* their authors believe that *Chevron* is waivable. They merely note that the government disavowed *Chevron*’s applicability or failed to claim *Chevron* deference adequately or at all.<sup>259</sup>

In a few instances, however, circuit courts have engaged the question of *Chevron*’s categorization as part of considering whether *Chevron* is waivable. For example, one of the most fascinating aspects of the D.C. Circuit’s initial embrace and subsequent rejection of the argument, described above, is the way in which that court’s discussions of the issue reflect the different potential categorizations of *Chevron* as a doctrine. That court in *Lubow* based its waiver conclusion in part on its characterization of *Chevron* as nonjurisdictional.<sup>260</sup> By contrast, that same court in *Guedes* decided that *Chevron* could not be waived at least partly because it saw *Chevron* as resembling interpretive canons like *expressio unius* and constitutional avoidance.<sup>261</sup>

Other circuits clearly appreciate the significance of *Chevron*’s categorization for the question of waiver. Summarizing the disagreement, but without reaching its own conclusion, the Eleventh Circuit in *Martin v. Social Security Administration* contended that some courts treat *Chevron* as “a non-jurisdictional argument that parties may waive,” while others “analogiz[e] *Chevron* deference to a standard of review that the court must independently

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<sup>256</sup> Aaron L. Nielson, *D.C. Circuit Review – Reviewed: More Chevron Waiver*, YALE J. ON REG. NOTICE & COMMENT (Apr. 24, 2020), <https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-more-chevron-waiver/> [<https://perma.cc/B3PW-J7FN>].

<sup>257</sup> See, e.g., *Dutcher v. Matheson*, 840 F.3d 1183, 1202–03 (10th Cir. 2016) (alternately describing a “late-blooming argument” that an applicable regulation was invalid as a “*Chevron*-based unreasonableness argument” and “a *Chevron* review argument”).

<sup>258</sup> See, e.g., *Humane Soc’y of U.S. v. Locke*, 626 F.3d 1040, 1054 n.8 (9th Cir. 2010) (observing that “agencies’ one-time statutory interpretations, if lacking in precedential force with respect to future actions, may not warrant [*Chevron*] deference” because they lack legal force, but declining to consider the question because the parties agreed that *Chevron* applied).

<sup>259</sup> See, e.g., *Neustar, Inc. v. FCC*, 857 F.3d 886, 893–94 (D.C. Cir. 2017); *Commodity Futures Trading Comm’n v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008).

<sup>260</sup> *Lubow v. U.S. Dep’t of State*, 783 F.3d 877, 884 (D.C. Cir. 2015).

<sup>261</sup> *Guedes v. Bureau of Alcohol, Tobacco Firearms & Explosives*, 920 F.3d 1, 22–23 (D.C. Cir. 2019) (per curiam), *cert. denied*, 140 S. Ct. 789 (2020) (mem.).

assess.”<sup>262</sup> The Fourth Circuit’s rejection of *Chevron*’s waivability in *Sierra Club* was premised explicitly on its belief that *Chevron* is a standard of review.<sup>263</sup> The Tenth Circuit, too, clearly views *Chevron*’s categorization and its waivability as potentially linked. In granting en banc review in the *Aposhian* case, that court requested briefing not only on the *Chevron* waiver question but also on whether “the Supreme Court intend[ed] for the *Chevron* framework to operate as a standard of review, a tool of statutory interpretation, or an analytical framework that applies where a government agency has interpreted an ambiguous statute,” among other questions.<sup>264</sup>

Waiver and forfeiture both presuppose the existence of a right or privilege on the litigant’s part.<sup>265</sup> Thus, to decide whether a particular right or privilege can be forfeited or waived, one must first determine what that right or privilege is—whether derived from the Constitution, a statute, an agency regulation, or common law. Rules of decision operationalize and effectuate those rights or privileges. For example, the Due Process Clause gives parties facing the government deprivation of a protected interest a legal right to adequate procedures.<sup>266</sup> Courts apply the three-part standard of *Mathews v. Eldridge* to evaluate procedural due process claims.<sup>267</sup> A litigant who fails to argue timely that an agency’s procedures violated the Due Process Clause waives or forfeits that claim, depriving a court of the opportunity to apply the standard of *Mathews*. The Administrative Procedure Act gives interested parties a legal right to adequate notice of and opportunity to comment on proposed regulations.<sup>268</sup> Courts apply a logical outgrowth test to assess whether proposed and final regulations are too different for notice to have been adequate.<sup>269</sup> If a litigant does not challenge the adequacy of an agency’s notice, it waives or

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<sup>262</sup> *Martin v. Soc. Sec. Admin.*, 903 F.3d 1154, 1161 (11th Cir. 2018).

<sup>263</sup> *Sierra Club v. U.S. Dep’t of the Interior*, 899 F.3d 260, 286 (4th Cir. 2018) (“We therefore must independently assure ourselves that any statutory interpretation provided by [the agency] qualifies for *Chevron* review and if not, whether it is entitled to a lesser form of deference . . .”).

<sup>264</sup> Order at 1, *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020) (No 19-4036), 2020 WL 5268055, at \*1.

<sup>265</sup> See *United States v. Olano*, 507 U.S. 725, 733 (1993) (describing forfeiture as the “failure to make the timely assertion of a right”); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (describing waiver as the “intentional relinquishment or abandonment of a known right or privilege”); see also *Waiving Chevron Deference*, *supra* note 200, at 1523.

<sup>266</sup> See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”) (internal quotation marks omitted) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (making the same point) (subsequent history omitted).

<sup>267</sup> *Mathews*, 424 U.S. at 333–35 (identifying three factors).

<sup>268</sup> 5 U.S.C. § 553(b)–(c) (2012).

<sup>269</sup> See, e.g., *Council Tree Commc’ns, Inc. v. FCC*, 619 F.3d 235, 249–50 (3d Cir. 2010) (describing the logical outgrowth test for determining compliance with APA § 553(b) and (c)). See generally Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213 (1996) (describing and rationalizing the standard).

forfeits that claim, and the reviewing court has no occasion to apply the logical outgrowth test.

Not so a standard of review. As typically understood, a standard of review is an instruction to a reviewing court regarding the appropriate framework or attitude to use in evaluating a particular claim or issue, rather than a right or privilege for a party to assert.<sup>270</sup> A standard of review may be perceived as favoring one party over another. The arbitrary and capricious standard and the substantial evidence standard in APA § 706(2), for example, both arguably favor the government by requiring reviewing courts to be somewhat deferential toward the agency's findings.<sup>271</sup> Standards of review are perceived as sufficiently significant that how they work, or which one applies, sometimes becomes its own separate issue or even the primary focus of a case.<sup>272</sup> Congress often identifies by statute the standard of review it wants courts to apply in evaluating certain issues or claims.<sup>273</sup> Ultimately, however, courts have an independent duty to ascertain the applicable standard of review that is independent of any action or inaction by the parties. In other words, standards of review simply are not waivable.<sup>274</sup>

For similar reasons, one does not normally think of a party waiving or forfeiting a canon of construction. Courts have made clear repeatedly that they

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<sup>270</sup> See, e.g., *Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009); *Worth v. Tyler*, 276 F.3d 249, 262–63 n.4 (7th Cir. 2001); *United States v. Vontsteen*, 950 F.2d 1086, 1091 (5th Cir. 1992) (en banc).

<sup>271</sup> See e.g., *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (noting that the substantial evidence standard's "threshold . . . is not high"); *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–44 (1983) (describing the arbitrary and capricious standard as "narrow and a court is not to substitute its judgment for that of the agency").

<sup>272</sup> See, e.g., *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108–16 (1989) (establishing a default standard of review for certain claims under the Employee Retirement Income Security Act); *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 681–86 (D.C. Cir. 1984) (resolving at length a disagreement over whether substantial evidence or arbitrary and capricious was the applicable standard of review); see also *Kisor v. Wilkie*, 139 S. Ct. 2400, 2419 (2019) (elaborating while declining to overturn *Auer* deference); *United States v. Mead Corp.*, 533 U.S. 218, 221, 226–27 (2001) (holding that *Skidmore* rather than *Chevron* deference applies to agency interpretations that lack the force of law).

<sup>273</sup> See Kozel, *supra* note 150, at 1125 ("The Supreme Court has left no doubt that specific interpretations of statutory provisions receive a unique, elevated form of deference going forward.").

<sup>274</sup> See, e.g., *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 286 (4th Cir. 2018) (citing several circuits for "parties cannot waive the proper standard of review by failing to argue it") (internal quotation marks omitted); *Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir. 2015) ("A party cannot waive, concede, or abandon the applicable standard of review."); *Gardner*, 568 F.3d at 879 (holding that the standard of review is an "unavoidable legal question" that the court "must ask, and answer, in every case"); *Worth*, 276 F.3d at 262–63 n.4 ("[T]he court, not the parties, must determine the standard of review, and therefore, it cannot be waived.").

need not depend on a party to raise a particular canon before using it,<sup>275</sup> nor are courts bound by parties' arguments regarding the best tools and methods for resolving statutory meaning.<sup>276</sup> Correspondingly, canons of construction are not precedential.<sup>277</sup> Hence, it has been suggested that *Chevron* and waiver are an "awkward conceptual fit."<sup>278</sup>

Still, the cases and commentary to date mostly dance around rather than squarely addressing the implications of *Chevron*'s categorization for the waiver question. James Durling and E. Garrett West contend that *Chevron* should not be waivable whether one categorizes it as a canon, a standard of review, or a "precedent," but they do not consider the implications of a *Chevron* rule of decision.<sup>279</sup> Jeremy Rozansky seems mostly to assume that *Chevron* is a standard of review.<sup>280</sup> An unsigned student note in the Harvard Law Review acknowledged that standards of review are not waivable because they represent claims that are not rights or privileges, but then compared *Chevron* to canons of construction.<sup>281</sup>

Rules of decision, standards of review, and canons of construction each come with a set of precedents, understandings, and first principles surrounding their waiver as well as their application. Failing to grapple with *Chevron*'s proper categorization makes it difficult to know which collection of precedents, understandings, and first principles to apply in evaluating the question of *Chevron* waiver.

### B. *Stare Decisis* and Overturning *Chevron*

Even more fundamentally, how we categorize *Chevron* may make a difference in how we think about calls from *Chevron*'s critics to overturn the doctrine. In this regard, when one contemplates the possibility of overturning *Chevron*, two particular questions follow: First, how do *stare decisis* principles

<sup>275</sup> See, e.g., *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 22 (D.C. Cir. 2019) (per curiam) ("We . . . would give no mind to a litigant's failure to invoke interpretive canons such as *expressio unius* or constitutional avoidance even if she intentionally left them out of her brief."), *cert. denied*, 140 S. Ct. 789 (2020) (mem.).

<sup>276</sup> See *id.*; see also Durling & West, *supra* note 205, at 190; Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1209 (2011); cf. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.").

<sup>277</sup> See *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) ("[C]anons are not mandatory rules."); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001) ("Canons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction."); see also Kozel, *supra* note 150, at 1127–28.

<sup>278</sup> *Guedes*, 920 F.3d at 22.

<sup>279</sup> Durling & West, *supra* note 205, at 188.

<sup>280</sup> Rozansky, *supra* note 27, at 1958–59 n.158 (discussing the implications of Congress failing to codify *Chevron* as a standard of review).

<sup>281</sup> *Waiving Chevron Deference*, *supra* note 200, at 1527–28.



apply to the *Chevron* doctrine? And second, what would it mean to “overrule” *Chevron*?

The principle of stare decisis is deceptively simple. It presumes that courts should abide by their prior decisions to promote fairness, predictability, and stability in the law.<sup>282</sup> Stare decisis takes on “enhanced force” in the context of statutory interpretation, because Congress can correct the judiciary’s mistakes.<sup>283</sup> But the Supreme Court has described stare decisis as a “principle of policy”<sup>284</sup> rather than “an inexorable command.”<sup>285</sup> Randy Kozel has described the process of deciding whether to adhere to precedent in a particular case as “essentially indeterminate,”<sup>286</sup> but the Court traditionally has recognized several factors as relevant: the quality of the precedent’s reasoning; the workability of the rule or standard established by the precedent; the precedent’s consistency (or lack thereof) with related decisions; legal developments since the precedent in question was decided, including changed understandings of the underlying facts; and the effect of overruling the case on legitimate reliance interests.<sup>287</sup>

Several observations about these factors are particularly relevant when thinking about overturning *Chevron*. First, although *Chevron* and other

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<sup>282</sup> See, e.g., *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019); *Kimble v. Marvel Entm’t, L.L.C.*, 576 U.S. 446, 455 (2015) (citation omitted); *Alleyne v. United States*, 570 U.S. 99, 118 (2013) (Sotomayor, J., concurring) (citation omitted); *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991).

<sup>283</sup> *Kimble*, 576 U.S. at 456. In this regard, the Court in *Kimble* cited *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989), which Congress subsequently superseded by statute, as illustrative. See *Kimble*, 576 U.S. at 456; see also *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 449–51 (2008) (documenting this history). But see *Gamble*, 139 S. Ct. at 1987–88 (Thomas, J., concurring) (questioning the “legal (as opposed to practical) basis for applying a heightened version of *stare decisis* to statutory-interpretation decisions”).

<sup>284</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 363 (2010) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)); *Payne*, 501 U.S. at 828 (same); *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 241 (1970) (same).

<sup>285</sup> See *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018) (citing several cases for this language).

<sup>286</sup> Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 414 (2010).

<sup>287</sup> See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (listing factors); *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) (same); *Janus*, 138 S. Ct. at 2478–79 (same). One source suggests that changed understandings of the facts underlying a precedent may be another factor. See BRANDON J. MURRILL, CONG. RESEARCH SERV., R45319, THE SUPREME COURT’S OVERRULING OF CONSTITUTIONAL PRECEDENT 17–18 (2018), <https://fas.org/sgp/crs/misc/R45319.pdf> [<https://perma.cc/5Z5G-6WUZ>]. The Court seems to have taken into account changes in facts on the ground when it overturned precedent in *South Dakota v. Wayfair, Inc.* 138 S. Ct. 2080, 2097–98 (2018) (emphasizing “the present realities of the interstate marketplace”). But contemporary Court decisions discussing stare decisis principles have not recognized this factor as such.

decisions explain at length the justifications for deference,<sup>288</sup> the quality of that reasoning may be in the eye of the beholder. But poor quality of reasoning alone is usually insufficient to overrule a precedent.<sup>289</sup> The Court generally will not overrule even a poorly-reasoned precedent unless it concludes that the precedent reached the incorrect result. After all, overruling a precedent generally entails adopting a different rule or principle that would have yielded the opposite result in the prior case.<sup>290</sup> And, in this regard, the Court may take note of whether the precedent was the result of a less-than-full vetting of the arguments<sup>291</sup> or the product of a sharply divided Court.<sup>292</sup>

Second, a precedent's rule or standard is "unworkable" when it fails to provide sufficient guidance to lower courts and others interpreting and applying it.<sup>293</sup> If a rule leaves lower courts with too much discretion, thereby leading to unpredictable and inconsistent case outcomes, the Court can justify abandoning it. For example, in *National League of Cities v. Usery*, the Supreme Court held that Congress lacked authority under the Commerce Clause to regulate the working conditions of state employees when those employees performed activities in "areas of traditional governmental functions."<sup>294</sup> Later concluding that there was no reliable basis for distinguishing between "traditional" and "nontraditional" government functions, the Court abandoned the *Usery* test and held that Congress could impose wage and hour requirements that applied to state employees.<sup>295</sup> Disagreements over how *Chevron* operates and when it applies complicate *Chevron* and leave it susceptible to claims that it is unworkable. Irrespective of *Chevron*, however, disagreements over methods and tools of statutory interpretation complicate that task.<sup>296</sup> How much complexity is attributable to *Chevron* as opposed to the milieu in which it functions is debatable.

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<sup>288</sup> See, e.g., *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980–82 (2005) (describing and justifying *Chevron* deference); *United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001) (same); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (same).

<sup>289</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992) (plurality opinion) ("[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.").

<sup>290</sup> See, e.g., *Wayfair*, 138 S. Ct. at 2099.

<sup>291</sup> See, e.g., *Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 658, 709 n.6 (1978) (Powell, J., concurring).

<sup>292</sup> See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828–29 (1991); cf. *Gamble v. United States*, 139 S. Ct. 1960, 1990 (2019) (Ginsburg, J., dissenting).

<sup>293</sup> See *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009).

<sup>294</sup> *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976).

<sup>295</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530–31 (1985) (subsequent history omitted).

<sup>296</sup> See, e.g., ROBERT A. KATZMANN, *JUDGING STATUTES* 29–54 (Oxford Univ. Press 2014) (offering thoughts on statutory interpretation methods); Kavanaugh, *supra* note 9, at 2134–62 (reviewing and responding to Judge Katzmann's book); Katzmann, *supra* note 40, at 388–98 (responding to Justice Kavanaugh's review).

In addition to how one evaluates *Chevron* in accordance with the various factors, however, how one categorizes *Chevron* ought to be relevant as well. Rules of decision seem to fit most naturally within the stare decisis framework. In theory, rules provide for a clear outcome given a set of factual predicates. Their mandatory nature makes them particularly likely to create significant reliance interests. And it is fairly easy to understand what it means to overturn a rule: Under the relevant precedent, a given set of facts should lead to outcome A, but the Court rejects that precedent and adopts a rule that results in outcome B instead. Most of those calling for *Chevron* to be overruled seem to conceive of the doctrine as a rule of decision.<sup>297</sup> If that is correct, the Court would presumably recognize the same stare decisis protections and apply the same factors that attend any other legal rule in deciding whether to overturn it.

At the other end of the spectrum are interpretive canons, which generally are thought to lack precedential value.<sup>298</sup> While there is an ongoing debate over whether interpretive methodologies *should* receive stare decisis effect, there is broad agreement that at present they do not.<sup>299</sup> Instead, canons provide a methodological tool that courts may or may not choose to apply in the appropriate circumstances. While courts often apply them only after ascertaining a particular trigger, such as ambiguity, nothing obligates them to do so.<sup>300</sup> One justice may be more or less likely to rely on a particular canon than another, but methodological commitments usually do not bind future courts.<sup>301</sup> Because canons are not precedential, do not bind courts, and frequently do not by themselves determine case outcomes,<sup>302</sup> “overruling” a canon as opposed to simply not using it makes little sense.

Many who place *Chevron* in the category of canon suggest that *Chevron* is not entitled to stare decisis effect at all. Raso and Eskridge argue that, because *Chevron* is a canon, it is “not a precedent,”<sup>303</sup> identifying several features that make canons incompatible with a “rule-based stare decisis.”<sup>304</sup> Because the general regulated public may care more about the meaning of a statute than the interpretive methodology that leads to that result, overruling a component of that methodology likely does not implicate any reliance interests. And because

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<sup>297</sup> See, e.g., *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (criticizing *Chevron* as a source of “reflexive deference”); Beerman, *supra* note 30, at 785 (describing *Chevron* as a “judge-made rule”).

<sup>298</sup> See Raso & Eskridge, Jr., *supra* note 62, at 1765–66 (discussing the differences between canons and precedents).

<sup>299</sup> Compare Gluck, *supra* note 32, at 1765–66, with Evan J. Criddle & Glen Staszewski, Essay, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1575–76 (2014). For further discussion, see Abbe R. Gluck, *What 30 Years of Chevron Teaches Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 613–14 (2014).

<sup>300</sup> See Gluck, *supra* note 299, at 613 & 613 n.26.

<sup>301</sup> See *id.*; see also Kozel, *supra* note 150, at 1127–28.

<sup>302</sup> See Eskridge, Jr. & Frickey, *supra* note 42, at 68 (“[Canons] are merely a factor to be considered, or a tiebreaker in close cases.”).

<sup>303</sup> Raso & Eskridge, Jr., *supra* note 62, at 1727.

<sup>304</sup> *Id.* at 1810.

statutory interpretation encompasses a cluster of competing and potentially inconsistent values, a clean-cut stare decisis analysis may not even be possible.<sup>305</sup> Randy Kozel takes this point a step further, arguing that *Chevron* is an interpretive methodology such that one Justice cannot bind a future Justice.<sup>306</sup>

Standards of review fall somewhere in the middle. They are binding in the sense that a court must identify and apply the appropriate standard of review in each case.<sup>307</sup> The Supreme Court can and often will remand a case for reconsideration based on a lower court's failure to apply the correct standard of review.<sup>308</sup> But the significant variation and malleability with which courts apply standards of review, as well as the difficulty in determining whether a standard of review is outcome determinative, undermine the binary choice that is usually involved in deciding whether or not to overrule a precedent.

In practice, courts have tended to adjust and clarify the meaning of standards of review over time rather than to overrule and replace them. Consider, for example, the substantial evidence standard for reviewing agency factfinding.<sup>309</sup> The Supreme Court long ago articulated the boilerplate expression of what constitutes substantial evidence, describing it as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>310</sup> Over the years, applying the standard in case after case, the courts have operationalized that boilerplate, yielding an extensive jurisprudence with detailed understandings and exceptions for what is and is not substantial evidence.<sup>311</sup>

If a standard of review derives from common law rather than statutory text, then of course the Supreme Court can overrule the standard and replace it with

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<sup>305</sup> *See id.*

<sup>306</sup> Kozel, *supra* note 150, at 1128–29.

<sup>307</sup> *See, e.g.,* U.S. Tobacco Coop. Inc. v. Big S. Wholesale of Va., LLC, 899 F.3d 236, 256 n.6 (4th Cir. 2018) ("[I]t is always the duty of our court to apply the proper standard of review . . . without regard to the . . . parties' arguments or their agreements to the contrary."); *Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009) (observing that "the correct standard of review . . . is . . . an unavoidable legal question we must ask, and answer, in every case").

<sup>308</sup> *See, e.g.,* Encino Motorcars, LLC v. Navarro, 136 S.Ct. 2117, 2127 (2016) (remanding for reconsideration using de novo review rather than *Chevron*) (subsequent history omitted); *United States v. Mead Corp.*, 533 U.S. 218, 238–39 (2001) (remanding for reconsideration using the *Skidmore* standard rather than *Chevron*).

<sup>309</sup> *See* 5 U.S.C. § 706(2)(E) (2012).

<sup>310</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *see also* *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939) (using virtually identical language prior to congressional adoption of the Administrative Procedure Act).

<sup>311</sup> *See, e.g.,* *Biestek v. Berryhill*, 139 S.Ct. 1148, 1155–57 (2019) (holding that an expert's refusal to provide her data did not prevent her testimony from qualifying as substantial evidence); *Richardson v. Perales*, 402 U.S. 389, 402 (1971) (holding that hearsay can constitute substantial evidence); *Universal Camera*, 340 U.S. at 488 (holding that substantial evidence requires consideration of the whole record); *see also* HICKMAN & PIERCE, JR., *supra* note 206, § 10.2, at 1082–1105 (documenting cases).

something else.<sup>312</sup> But many standards of review are statutory, meaning that Congress can replace them but the Court cannot.<sup>313</sup> Yet, the statutory requirement is naught but the label—e.g., the use of a phrase like substantial evidence or arbitrary and capricious.<sup>314</sup> The real meat of any statutory standard of review lies in the judicially-developed boilerplate and operational details.<sup>315</sup> Thus, even with a statutory standard of review, courts have a fair degree of latitude in adjusting over time the details that operationalize the standard. It is harder to conceptualize overruling a mood that is difficult to capture in words in the first place. Overturning the label may shift the rhetoric but perhaps not quite the mood. That malleability may be why courts more typically alter standards of review through iterative clarification rather than replacement.

#### IV. *CHEVRON* IS A STANDARD OF REVIEW

*Chevron* is a multifaceted doctrine, often applied inconsistently, and thus readily susceptible to being categorized in several ways simultaneously—especially when the categories themselves are not necessarily mutually exclusive. The Supreme Court’s *Chevron* jurisprudence is sufficiently variable that one can find examples to support almost any reasonable characterization of the doctrine. Case law provides plenty of evidence to support describing *Chevron* as a rule of decision or a canon of construction. Nevertheless, we are convinced that, when categorizing *Chevron* might matter, *Chevron* is best considered a standard of review.

Part of our reasoning for categorizing *Chevron* as a standard of review is simply impressionistic, based on our comparison of *Chevron* cases with the categorical alternatives as we understand them and have explained them in this Article. Too indeterminate to be a rule of decision, yet too dominant to be a canon of construction, *Chevron* best resembles a standard of review by providing a framework for judicial analysis of challenges to the validity of agency statutory interpretations and describing the proper judicial attitude when statutory text and traditional interpretive methods fail to provide clear answers. Casting *Chevron* as a rule of decision discounts, and thus discourages, all of the questions and analysis *Mead* and *Chevron* together contemplate before a court defers. Treating *Chevron* as a canon of construction renders it optional and risks

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<sup>312</sup> Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 371 (1997) (“Precedents can be overruled just as legislators and statutes can be changed.”).

<sup>313</sup> E.g., 5 U.S.C. § 706(2)(A) (2012); 42 U.S.C. § 405(g) (2012).

<sup>314</sup> *Williams v. Commonwealth, Real Estate Bd.*, 698 S.E.2d 917, 930 (Va. Ct. App. 2010) (determining arbitrary and capricious actions as “willful and unreasonable” or without “determining principle” from prior case law as opposed to the Virginia Statute) (quoting Sch. Bd. of Norfolk v. Wescott, 492 S.E.2d 146, 150 (Va. 1997)).

<sup>315</sup> See, e.g., Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 248–49 (2009) (“[W]hen the language of the standard itself is vague, courts are more likely to define the standard, heaping on qualifiers and explanations so that it becomes more convoluted over time.”).

judicial intrusion into a policymaking space that judges are ill equipped to occupy.

Nevertheless, our view that *Chevron* is a standard of review is informed as well by our perception that *Chevron* should be regarded as a judicial construction of the APA's scope of review provision, including but not limited to the arbitrary and capricious standard of APA § 706(2)(A).<sup>316</sup> As described above, the operational details of standards of review often evolve as courts apply them to many cases over time. As explained below, changes in administrative law doctrine and agency rulemaking practices in the late 1960s and 1970s gave agencies greater latitude to exercise policymaking discretion through rulemaking. *Chevron* emerged as courts applied APA § 706—admittedly more implicitly than explicitly—in evaluating challenges to agency regulations adopted under these contemporary conditions. The Supreme Court has never said so unequivocally, but it has danced around and implied a relationship between *Chevron* and the APA's arbitrary and capricious standard for years. If *Chevron* fits this characterization, then like the arbitrary and capricious standard that it construes, *Chevron* is both a standard of review and more anchored to statutory text than its detractors like to admit.

#### A. Statutory Connections

Section 706 of the Administrative Procedure Act, entitled “Scope of Review,” describes the role of a court reviewing agency action, in pertinent part, as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall— . . .  
(2) hold unlawful and set aside agency action, findings, and conclusions found to be—  
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .<sup>317</sup>

Importantly, the statute does not explain exactly what it means for agency action actually to be arbitrary and capricious. The terms are hardly self-defining. Looking them up in a dictionary offers little guidance as to their application in the context of judicial review of agency action.<sup>318</sup>

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<sup>316</sup> 5 U.S.C. § 706(2)(A) (2012); cf. Cass R. Sunstein, *Chevron Is Not Inconsistent with the APA*, YALE J. ON REG. NOTICE & COMMENT (Sept. 16, 2020), <https://www.yalejreg.com/nc/chevron-is-not-inconsistent-with-the-apa-by-cass-r-sunstein/> [<https://perma.cc/M5LM-74PW>] (reaching a similar conclusion, although based mostly on different evidence than we discuss below).

<sup>317</sup> 5 U.S.C. § 706 (2012).

<sup>318</sup> See *Arbitrary*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Capricious*, BLACK'S LAW DICTIONARY (11th ed. 2019) (neither implicate judicial review of agencies).

The provision goes on in § 706(2)(C) to counsel reviewing courts to set aside agency actions that are “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”<sup>319</sup> Putting that provision together with the flush language at the beginning of § 706, instructing reviewing courts to “decide all relevant questions of law” and to “interpret . . . statutory provisions,”<sup>320</sup> it seems apparent that Congress intended courts rather than agencies to review agency statutory interpretations *de novo*, rather than deferentially.

But what happens when traditional tools of statutory interpretation fail to answer the relevant interpretive question? No one seriously doubts that contemporary statutes confer extensive policymaking discretion on agencies.<sup>321</sup> Although many such statutory grants are explicit—e.g., expressly instructing agencies to adopt regulations to accomplish a specific, congressionally-identified purpose<sup>322</sup>—one of *Chevron*’s central insights was that the line between statutory interpretation and policymaking discretion is not always so easy to draw.<sup>323</sup> Different judges may disagree as to where that line falls, but most at least acknowledge that the line exists.<sup>324</sup>

<sup>319</sup> 5 U.S.C. § 706(2)(C) (2012).

<sup>320</sup> *Id.* § 706(2).

<sup>321</sup> Indeed, one question that divides the Justices is whether and when Congress delegates too much discretion to agency officials. *See Gundy v. United States*, 139 S. Ct. 2116, 2148 (2019) (Gorsuch, J., dissenting) (arguing that the statute at issue was “delegation running riot”) (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring)), *rehearing denied*, 140 S. Ct. 579 (mem.).

<sup>322</sup> *See, e.g., Cuozzo Speed Techs., L.L.C. v. Lee*, 136 S. Ct. 2131, 2142, 2144 (2016) (citing 35 U.S.C. § 316(a)(4)); *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45 (2002) (citing 49 U.S.C. § 11506(c)(1) (1994)); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 79 (2002) (citing 42 U.S.C. § 12116); *Sullivan v. Zebley*, 493 U.S. 521, 525 & 525 n.2, 528 (1990) (citing 42 U.S.C. §§ 405(a) & 1383(d)(1) (1982, Supp. V)).

<sup>323</sup> *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.”); *see also, e.g., 42 U.S.C. § 7409(a)–(b)* (2012) (requiring the EPA Administrator to adopt national primary and secondary ambient air quality standards as necessary to protect public health and welfare based on specified criteria); *47 U.S.C. § 251(d)(1)–(2)* (2012) (requiring the FCC to adopt regulations to facilitate the availability of telephone service network elements to the extent “access . . . is necessary” and “failure to provide access . . . would impair the telecommunications carrier seeking access to provide the services that it seeks to offer”).

<sup>324</sup> *Compare* Kavanaugh, *supra* note 9, at 2153–54 (arguing that judges should be most willing to defer to agencies when a statute uses “broad and open-ended terms like ‘reasonable,’ ‘appropriate,’ ‘feasible,’ or ‘practicable,’” but should strive to find the “best reading” when dealing with more specific statutory provisions), *with* Katzmman, *supra* note 40, at 398 (suggesting that Justice Kavanaugh’s approach may “not reflect appropriate deference to Congress”). For further discussion, *see* Scalia, *supra* note 9, at 520–21 (discussing what it means for a statute to be ambiguous). *But see* Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323 (2017) (“I personally have never had occasion to reach *Chevron*’s step two in any of my cases . . .”).

At this point, it is useful to recall that the standards of the APA's scope of review provision are not mutually exclusive but rather are understood to be cumulative.<sup>325</sup> Agency exercises of policymaking discretion typically fall under the purview of the APA § 706(2)(A) arbitrary and capricious standard, which is deferential and does not allow a court to substitute its own judgment for that of the agency.<sup>326</sup> It is fairly obvious that agency actions that exceed statutory authority correspondingly are not in accordance with law, and thus are arbitrary and capricious.<sup>327</sup> But agency actions that do not exceed statutory authority as a matter of mere interpretation still can be arbitrary and capricious and thus must be set aside as well.<sup>328</sup> Wherever the precise line between statutory interpretation and policymaking discretion falls, when traditional tools of statutory interpretation fail and policymaking takes over, the arbitrary and capricious standard comes into play.

The Supreme Court has never fully articulated this analysis, but it has hinted at it (or more) on a number of occasions.<sup>329</sup> In the *Chevron* opinion itself, the Court did not cite APA § 706, but it used language evocative of that provision. In describing *Chevron*'s second step, the Court spoke of legislative regulations adopted pursuant to express delegations of authority as "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute"<sup>330</sup>—language not precisely aligned with APA § 706(2)(A), but not far

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<sup>325</sup> See, e.g., *Ass'n of Data Processing Serv. Orgs. v. Bd of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984) (making this observation); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 n.25 (10th Cir. 1994) (same).

<sup>326</sup> See, e.g., *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (describing the arbitrary and capricious standard in these terms) (subsequent history omitted); *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983) (same); *Atl. Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1388–89 (D.C. Cir. 1995).

<sup>327</sup> See, e.g., *Cal. Cmty. Against Toxics v. EPA*, 928 F.3d 1041, 1053 (D.C. Cir. 2019) (treating § 706(2)(A), § 706(2)(C), and *Chevron* as synonymous in this context); *Nw. Envtl. Advocates v. U.S. EPA*, 537 F.3d 1006, 1019 (9th Cir. 2008) (same); Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1733 (2011) ("Although these standards differ in their phrasing, each attempts to pair judicial deference with a reasoned decisionmaking requirement.").

<sup>328</sup> *Cf. Negusie v. Holder*, 555 U.S. 511, 517–18, 521–23 (2009) (concluding that the statute was ambiguous but remanding without evaluating the reasonableness of the agency's interpretation because the agency had based its action on its belief that the statute was unambiguous); *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1149–51 (9th Cir. 2013) (same); *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1353–55 (D.C. Cir. 2006) (collecting circuit cases in support of this proposition).

<sup>329</sup> See, e.g., *Encino Motorcars, L.L.C. v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (citing APA § 706 in conjunction with *Chevron*) (subsequent history omitted); *Smiley v. Citibank (S.D.)*, N. A., 517 U.S. 735, 742 (1996) (same); *Nat'l Fed'n of Fed. Emps. v. Dep't of Interior*, 526 U.S. 86, 98–99 (1999) (citing APA § 706 in conjunction with *Chevron*) (subsequent history omitted); see also *City of Arlington v. FCC*, 569 U.S. 290, 316–17 (2013) (Roberts, C.J., dissenting) (arguing that *Chevron* is consistent with APA § 706).

<sup>330</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).



from it, either.<sup>331</sup> In describing *Chevron* deference more generally, the Court has frequently used the same or similar phrasing,<sup>332</sup> and not just with respect to legislative regulations.<sup>333</sup> Moreover, in discussing delegations that are “implicit rather than explicit,” the Court in *Chevron* spoke of deferring to “reasonable” interpretations.<sup>334</sup> The Court often has used the word “reasonable” or derivations thereof as representing the opposite of arbitrary and capricious, not only in describing *Chevron* step two<sup>335</sup> but also in its discussions of APA § 706(2)(A) more generally.<sup>336</sup>

In *United States v. Mead Corp.*, the Court again described certain agency actions as being worthy of deference of *Chevron* step two unless they are “procedurally defective, arbitrary and capricious in substance, or manifestly contrary to the statute,” and cited APA § 706(2)(A) and (D) as well as the *Chevron* opinion itself for this proposition.<sup>337</sup> In a footnote, the Court qualified this proposition by observing that such deference obviously would be inappropriate if the interpretation at issue exceeded the agency’s jurisdiction under the statute, citing APA § 706(2)(C).<sup>338</sup>

Finally, although sometimes the Court’s *Chevron* step two analysis seems focused on statutory interpretation alone,<sup>339</sup> in several cases, the Court has more explicitly linked *Chevron* step two analysis and APA arbitrary and capricious review as interpreted by the Supreme Court’s decision in *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*<sup>340</sup> The

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<sup>331</sup> See 5 U.S.C. § 706(2)(A) (2012).

<sup>332</sup> See, e.g., *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 524 (2014); *Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145, 157 (2013); *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002); *United States v. O’Hagan*, 521 U.S. 642, 673 (1997); *Smiley*, 517 U.S. at 742; *Sullivan v. Zebley*, 493 U.S. 521, 528 (1990); *Atkins v. Rivera*, 477 U.S. 154, 162 (1986).

<sup>333</sup> See, e.g., *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994) (concerning NLRB adjudication).

<sup>334</sup> *Chevron*, 467 U.S. at 844.

<sup>335</sup> See, e.g., *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 395–96 (2008); *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *United States v. Haggard Apparel Co.*, 526 U.S. 380, 383 (1999) (subsequent history omitted).

<sup>336</sup> See, e.g., *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1933 (2020) (Kavanaugh, J., concurring) (“The APA’s arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained.”); see also *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995) (describing “whether the agency’s regulations were reasonable” as “a hallmark of traditional arbitrary and capricious review”).

<sup>337</sup> *Mead Corp.*, 533 U.S. at 227.

<sup>338</sup> *Id.* at 227 n.6.

<sup>339</sup> See, e.g., *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 387–92 (1999) (rejecting an agency interpretation at *Chevron* step two for failing to give full effect to the limiting quality of the word “necessary”).

<sup>340</sup> *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983) (interpreting the APA’s arbitrary and capricious standard as requiring agencies to justify their discretionary choices contemporaneously with their actions); see also HICKMAN & PIERCE, JR., *supra* note 206, § 3.5.1 (discussing the connection at length);

Court in that case explained the APA § 706(2)(A) arbitrary and capricious standard as requiring agencies to explain and justify their discretionary choices contemporaneously with their actions.<sup>341</sup> Thus, for example, in *National Cable and Telecommunications Ass'n v. Brand X Internet Services*, the Supreme Court applied *Chevron* to evaluate an FCC statutory interpretation, then cited both *Chevron* and *State Farm* in the course of concluding that the agency's interpretation was reasonable and entitled to deference because the agency adequately explained why it chose and why it changed that interpretation.<sup>342</sup> In *Judulang v. Holder*, although the Court analyzed the Board of Immigration Appeals adjudication at issue through the *State Farm* lens, it noted that the government had argued in favor of applying *Chevron* step two instead.<sup>343</sup> In response to the government's argument, the Court observed, "[w]ere we to do so, our analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is 'arbitrary or capricious in substance.'" <sup>344</sup> In *Michigan v. EPA*, the Court recognized that the terms "appropriate and necessary" in the Clean Air Act could support more than one reasonable interpretation.<sup>345</sup> Nevertheless, citing *State Farm*, the Court concluded that the EPA's interpretation of the statute was not "appropriate," and thus was not reasonable at *Chevron* step two, because it failed to take adequate account of cost and did "significantly more harm than good."<sup>346</sup> And in *Encino Motorcars, LLC v. Navarro*, the Court declared that a regulation in which the Labor Department changed its interpretation of the Fair Labor Standards Act was ineligible for *Chevron* deference because it failed to justify the change, and thus was arbitrary and capricious.<sup>347</sup>

To be sure, *Chevron* is not the only interpretation of the arbitrary and capricious standard of APA § 706(2)(A). That standard also comes into play in reviewing agency findings of fact<sup>348</sup> as well as claims that an agency has failed to engage in reasoned decisionmaking independent of statutory

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Levin, *supra* note 10, at 1285–86 (arguing that *Chevron* step two overlaps considerably with *State Farm* analysis).

<sup>341</sup> *State Farm*, 463 U.S. at 42–43.

<sup>342</sup> *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980–82, 986, 1000–01 (2005).

<sup>343</sup> *Judulang v. Holder*, 565 U.S. 42, 52 & 52 n.7, 53 (2011).

<sup>344</sup> *Id.* at 52 n.7.

<sup>345</sup> *Michigan v. EPA*, 135 S. Ct. 2699, 2706–08 (2015).

<sup>346</sup> *Id.* at 2707, 2713–14.

<sup>347</sup> *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (subsequent history omitted).

<sup>348</sup> See, e.g., *Atlanta Gas Light Co. v. FERC*, 140 F.3d 1392, 1397 (11th Cir. 1998) (describing the substantial evidence standard as "no more than a recitation of the application of the 'arbitrary and capricious' standard to factual findings") (quoting *Md. People's Counsel v. FERC*, 761 F.2d 768, 774 (D.C. Cir. 1985)); *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 682–86 (D.C. Cir. 1984) (discussing the relationship between the arbitrary and capricious standard and the substantial evidence standard in the context of reviewing agency factual findings).

interpretation.<sup>349</sup> In a sense, the arbitrary and capricious standard is a standard of review that carries different boilerplate descriptions for different types of claims brought under the APA more generally. Regardless, the arbitrary and capricious standard is broadly recognized as a standard of review. If *Chevron* is perceived as a construction of APA § 706, then it stands to reason that *Chevron* is a standard of review as well.

### B. Historical Grounding

*Chevron*'s detractors particularly may argue that the mere ability to reconcile *Chevron* with the text of APA § 706 is inadequate reason to do so. Certainly, no one could argue that Congress intended to endorse *Chevron* as such when it enacted the APA, since the Court did not decide *Chevron* until decades later.<sup>350</sup> Also, the Court has been less than clear in explaining the connection between the APA and *Chevron*. Meanwhile, judges and legal scholars have described the *Chevron* doctrine as all of revolutionary,<sup>351</sup> accidental,<sup>352</sup> and entirely judge-made<sup>353</sup>—none of which quite fits the solid textual connection between *Chevron* and the APA we suggest. All of these characterizations of *Chevron* are accurate to a point, yet none tells the complete story.

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<sup>349</sup> See, e.g., *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (describing APA § 706(2)(A) as “requir[ing] agencies to engage in ‘reasoned decisionmaking’” (citation omitted); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2398 (2020) (Kagan, J., concurring) (noting that an agency violates the arbitrary and capricious standard when it “flunk[s] the test of ‘reasoned decisionmaking’” by failing to give “a satisfactory explanation for its action”) (quoting *Michigan v. EPA*, 576 U.S. 743, 750 (2015), and *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (observing that APA § 706(2)(A) limits the Court “to ensuring that [the agency] remained ‘within the bounds of reasoned decisionmaking’” (citation omitted) (subsequent history omitted).

<sup>350</sup> See generally *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). By comparison, the APA was adopted in 1946. See *Administrative Procedure Act of 1946*, Pub. L. No. 79-404, 60 Stat. 237.

<sup>351</sup> See, e.g., Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 *YALE L.J.* 969, 976 (1992) (“Justice Stevens’ opinion contained several features that can only be described as ‘revolutionary,’ even if no revolution was intended at the time.”) (footnote omitted).

<sup>352</sup> See, e.g., Gary S. Lawson, *Reconceptualizing Chevron and Discretion: A Comment on Levin and Rubin*, 72 *CHI.-KENT L. REV.* 1377, 1379 (1997) (“After all, we have a ‘*Chevron* two-step’ only because of the accident of Justice Stevens’ prose in *Chevron*. And it was clearly an accident.”).

<sup>353</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (“*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty.”), *vacated*, *In re Gutierrez Brizuela*, No. XXXX XX3 099, 2018 WL 1756899 (B.I.A. Jan. 4, 2018); see also John F. Duffy, *Administrative Common Law in Judicial Review*, 77 *TEX. L. REV.* 113, 192 (1998) (“*Chevron* is actually an aggressive fashioning of judge-made law by the Court.”).

For example, it is generally understood that Justice Stevens, the *Chevron* opinion's author, did not mean to announce a major doctrinal shift.<sup>354</sup> Justice Breyer, too, has suggested that "*Chevron* made no relevant change" to prior doctrine except to "focus[] upon an additional, separate legal reason for deferring to certain agency determinations"—i.e., congressional delegation.<sup>355</sup> Certainly *Chevron* enjoys landmark status, and the doctrine's sheer pervasiveness belies the suggestion that it made no change at all. Nevertheless, one can see glimmers of *Chevron* in case law dating as far back as the 1930s, if not earlier.

We do not mean to suggest that courts in the 1930s conceived of or anticipated *Chevron* as it functions today. But as we have discussed, standards of review evolve, with courts filling in details over time to operationalize labels that themselves at best convey an approximate judicial attitude or mood.<sup>356</sup> Indeed, the best explanation of *Chevron* is as an evolutionary adjustment to the courts' construction of APA § 706 and the arbitrary and capricious standard, adopted in reaction to the rise of contemporary agency rulemaking and other changes in administrative law doctrine and interpretations of the APA in the late 1960s and 1970s.

Enacted in 1946, the APA is often described at least in part as a codification of existing legal understandings and administrative practices as they existed prior to its enactment.<sup>357</sup> Judicial deference to agency legal interpretations was not a new concept when the APA was adopted.<sup>358</sup> Courts in the early twentieth century recognized that statutes often left certain matters to the discretion of agency officials and declined to inquire too deeply into those discretionary actions.<sup>359</sup> Agency actions from this period were perceived as addressing questions that involved a conglomeration of law, fact, and policymaking

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<sup>354</sup> See Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 275–76 (2014) (summarizing the evidence that the Court did not believe *Chevron* was a major departure from prior law).

<sup>355</sup> See *Christensen v. Harris Cty.*, 529 U.S. 576, 596–97 (2000) (Breyer, J., dissenting).

<sup>356</sup> See *supra* Part II.B.

<sup>357</sup> See, e.g., Comment, *The Federal Administrative Procedure Act: Codification or Reform?*, 56 YALE L.J. 670, 673 (1947) ("In some respects [the APA] is simply a codification of existing law and practice[.]"); see also McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. L., ECON. & ORG. 180, 181–83 (1999) (observing that, "[a]ccording to most legal scholarship, the purpose of the APA was to codify and rationalize existing practice[s]" while arguing that Congress also "refashioned" some practices to accomplish political goals).

<sup>358</sup> See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 n.14 (1984) (collecting cases predating the APA).

<sup>359</sup> See KENNETH CULP DAVIS, HANDBOOK ON ADMINISTRATIVE LAW § 246, at 880 (1951) ("The courts have long refused to substitute judgment on some questions which are analytically law, and on many questions of discretion, policy, and judgment."); FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 98 (1941) (recognizing "the growth of administrative rule making" due in part to "[t]he increasing use by Congress of 'skeleton legislation,' to be amplified by executive regulations").

discretion.<sup>360</sup> Consequently, many cases both before and immediately after the APA's enactment talked about statutes conferring discretion on agency officials and limiting the "scope" of judicial review.<sup>361</sup>

For example, in 1936, in *AT&T Co. v. United States*, the Court considered a challenge to FCC regulations establishing uniform accounting standards for ratemaking.<sup>362</sup> The statute offered little interpretive guidance, simply instructing the FCC "in its discretion, [to] prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to [the] Act, including the accounts, records and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys."<sup>363</sup> In reviewing the FCC's regulations implementing this provision, the Court described its function as follows:

This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action here involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be "so entirely at odds with fundamental principles of correct accounting" as to be the expression of a whim rather than an exercise of judgment.<sup>364</sup>

Similarly, in 1943, in *National Broadcasting Co. v. United States*,<sup>365</sup> in upholding FCC regulations governing radio chain broadcasting in the "public interest, convenience, or necessity" against a claim that the regulations were arbitrary and capricious, the Court observed,

If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. . . . Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted

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<sup>360</sup> DAVIS, *supra* note 359, § 246, at 885 (recognizing a "large group of cases in which courts withhold substitution of judgment on non-factual issues involv[ing] what is variously denominated discretion, policy, or judgment").

<sup>361</sup> See, e.g., *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 602 (1944); *Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 276–77 (1933); *United States v. Williams*, 278 U.S. 255, 257–58 (1929); *Silberschein v. United States*, 266 U.S. 221, 225 (1924); *Interstate Commerce Comm'n v. Ill. Cent. R.R. Co.*, 215 U.S. 452, 470 (1910).

<sup>362</sup> *Am. Tel. & Tel. Co. (AT&T) v. United States*, 299 U.S. 232, 235 (1936).

<sup>363</sup> Communications Act of 1934, ch. 652, § 220(a), 48 Stat. 1064, 1078 (1934).

<sup>364</sup> *AT&T*, 299 U.S. at 236–37 (quoting *Kan. City S. Ry. Co. v. United States*, 231 U.S. 423, 444 (1913)).

<sup>365</sup> *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943).

by Congress. It is not for us to say that the “public interest” will be furthered or retarded by the [Regulations].<sup>366</sup>

In both of these instances, the FCC’s authority was not unlimited. It is axiomatic that agencies may not exceed their statutory jurisdiction, so any regulations the FCC adopted had to be consistent with the text, history, and purpose of the applicable statute.<sup>367</sup> But within those statutory boundaries, the agency obviously enjoyed tremendous latitude in deciding what rules to adopt. Traditional tools of statutory interpretation offered little guidance regarding those details. There was no one right or even best interpretation of the statute in that regard, only policy choice. And, as with anything else, reasonable people could disagree over the merits of the choices made, as they did in these cases.<sup>368</sup> When traditional statutory interpretation ran out, in the face of a clear delegation of policymaking discretion from Congress to the agency, the only option for the Court was assessing reasonableness and then deferring to the FCC’s reasonable regulations.

Recognizing this reality, in discussing judicial review particularly of agency rulemaking under the then-newly-enacted APA, Kenneth Culp Davis in 1951 described a “difference between delegated administrative power and administrative power which is subordinate to independent judicial action.”<sup>369</sup> He contended that difference was “the same as that between legislative rules and interpretative rules,”<sup>370</sup> with the former involving the exercise of agency discretion and the latter representing mere interpretation.<sup>371</sup>

As late as 1977, in *Batterton v. Francis*, the Supreme Court recognized this same distinction.<sup>372</sup> The case concerned the validity of a legislative regulation promulgated pursuant to an express statutory grant of authority to establish standards, in this instance defining the term “unemployment” for purposes of determining eligibility for certain welfare payments.<sup>373</sup> Citing the *AT&T* case from 1936 as well as APA § 706(2)(A) and (C), the Court acknowledged,

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<sup>366</sup> *Id.* at 224.

<sup>367</sup> See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 843 n.9 (1984) (recognizing that agencies and courts both “must give effect to the unambiguously expressed intent of Congress” and citing several cases spanning fifty years); see also *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (“Executive action under legislatively delegated authority that might resemble ‘legislative’ action in some respects . . . is always subject to check by the terms of the legislation that authorized it . . .”).

<sup>368</sup> See, e.g., *Nat’l Broad. Co.*, 319 U.S. at 209 (documenting the dispute over the merits of the agency’s regulations); *AT&T*, 299 U.S. at 236 (describing the particular accounting method choices under challenge).

<sup>369</sup> DAVIS, *supra* note 359, § 249, at 899.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.* § 249, at 899–900.

<sup>372</sup> *Batterton v. Francis*, 432 U.S. 416, 424–26 (1977).

<sup>373</sup> *Id.* at 418 n.2, 425 (describing the question at issue and quoting the relevant statutory text).

In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.

The regulation at issue in this case is therefore entitled to more than mere deference or weight. It can be set aside only if the Secretary exceeded his statutory authority or if the regulation is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>374</sup>

In a footnote, the Court went on to note, by contrast, that it was not required to give such consideration to “interpretative regulations,” which it described as “administrative interpretations” eligible only for “[v]arying degrees of deference . . . based on such factors as the timing and consistency of the agency’s position, and the nature of its expertise.”<sup>375</sup>

Aditya Bamzai has offered a different historical account that would seem to contradict this story. Bamzai argues that both the Supreme Court in *Chevron* and scholarly defenses of the *Chevron* doctrine misconstrued nineteenth century cases cited in the *Chevron* decision as supporting judicial deference to agency legal interpretations.<sup>376</sup> He also contends that Congress sought with the APA to curtail any such deference to agency legal interpretations based on “technical competence” or “specialized knowledge.”<sup>377</sup> Bamzai may be right about nineteenth century case law and the extent to which courts were willing to defer to agency interpretations of statutes that could be evaluated using traditional interpretive methods and tools. But his account overemphasizes the distinction between questions of law and questions of fact, with little to no attention to early twentieth century recognition of a third category of question based on congressional delegation and agency exercises of policymaking discretion.<sup>378</sup> It is this third category that, as described above, is reflected in the APA

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<sup>374</sup> *Id.* at 425–26 (citation omitted).

<sup>375</sup> *Id.* at 425 n.9 (distinguishing legislative regulations adopted under specific grants of rulemaking power from interpretative regulations given more limited deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and other like cases).

<sup>376</sup> Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 912–14 (2017).

<sup>377</sup> *Id.* at 985–86 (quoting FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 246–47 (1941)).

<sup>378</sup> See *id.* at 971–76. John Dickinson, on whose work Bamzai relies heavily, acknowledged this third category of question but gave it minimal attention, perhaps because such explicit agency discretion was less widespread when he wrote than after the New Deal. See JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 160–63 (1927) (describing the discretion extended to the ICC by the Hepburn Act, and judicial reluctance to interfere in ICC exercises of such discretionary authority). Later, the Attorney General’s Committee on Administrative Procedure, which Bamzai also discusses, recognized questions of discretion uncritically in discussing judicial review of agency rulemaking. See, e.g., FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 116–17 (1941).

§ 706(2)(A) arbitrary and capricious standard. And it is this third category that *Chevron* acknowledges and captures with its two steps as well as its citation of cases like *AT&T*, *National Broadcasting*, and *Batterton*, which Bamzai does not address.<sup>379</sup>

Bamzai's analysis also fails to take into account several doctrinal trends regarding agency rulemaking that occurred in the 1960s and 1970s and set the stage for *Chevron*. For the first few decades of the APA, agencies did not adopt broadly-sweeping regulations often, instead either preferring or believing themselves limited to case-by-case adjudication as a means of articulating policy-driven interpretations of statutes.<sup>380</sup> Partly this reluctance may have been the consequence of the perceived onerousness of formal rulemaking procedures.<sup>381</sup> Also, however, the consensus view of legal scholars, and presumably of courts as well, was that the nondelegation doctrine limited agency authority to adopt legally-binding regulations (as opposed to lesser, nonbinding interpretative rules) to instances in which Congress specifically identified the regulations to be adopted.<sup>382</sup>

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<sup>379</sup> See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 844 n.13 (1984). See generally Bamzai, *supra* note 378.

<sup>380</sup> See *SEC v. Chenery Corp.*, 332 U.S. 194, 201–03 (1947) (holding that the choice between rulemaking and adjudication for communicating policy choices is for the agency, not the courts); see also Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1145 (2001) (“Before the 1960s agencies acted mainly through case-by-case adjudications. . . . Rulemaking by agencies played only a minor role in New Deal administration.”).

<sup>381</sup> See, e.g., 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 6.06, at 382 (1958) (quoting a Food and Drug Administration official as saying that formal rulemaking was “costly, time-consuming and not too well adapted for the job to be done” and involved “[e]xcessive delays, protracted proceedings and mountainous records . . .”); Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1287 (1972) (describing the sixteen formal rulemakings conducted by the FDA over a decade as “vary[ing] from unnecessarily drawn out proceedings to virtual disasters” with “drawn out, repetitious and unproductive” hearings); Nicholas Johnson, *The Second Half of Jurisprudence: The Study of Administrative Decisionmaking*, 23 STAN. L. REV. 173, 197 (1970) (reviewing KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969)) (describing formal rulemaking as “often less efficient than adjudication” as well as “procedurally more cumbersome, consum[ing] more agency resources, and . . . more susceptible to delaying tactics by the parties”).

<sup>382</sup> See, e.g., Ellsworth C. Alvord, *Treasury Regulations and the Wilshire Oil Case*, 40 COLUM. L. REV. 252, 259–61 (1940); Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919, 928–29 (1948); see also Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1566–67 (2006) (documenting this consensus).



Agency rulemaking expanded dramatically starting around the late 1960s.<sup>383</sup> The nondelegation doctrine by then was perceived as moribund.<sup>384</sup> Agencies began asserting that statutory provisions granting more generalized rulemaking authority gave them the power to adopt more of their interpretations as legally-binding regulations.<sup>385</sup> Congress also adopted new statutes conferring additional discretionary authority on agencies.<sup>386</sup> Meanwhile, the Supreme Court's 1973 decision in *United States v. Florida East Coast Railway*<sup>387</sup> curtailed sharply the applicability of the APA's formal rulemaking procedures, making it easier for agencies to adopt legislative regulations.<sup>388</sup> Academics objected to formal rulemaking as too procedurally onerous but otherwise highlighted several benefits of rulemaking over adjudication for communicating policy preferences.<sup>389</sup>

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<sup>383</sup> See, e.g., 1 HICKMAN & PIERCE, JR., *supra* note 206, § 1.6, at 40 ("Rulemaking began to emerge as the dominant form of regulation in the 1970s."); BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 4.3, at 167 (3d ed. 1991) (noting a rise in rulemaking in this period); Schiller, *supra* note 380, at 1147 ("Beginning in the 1960s federal agencies' neglect of rulemaking began to decline, gradually at first and then with such speed that by the 1970s commentators declared that the administrative state had entered the 'age of rulemaking.'").

<sup>384</sup> See, e.g., 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 3.2, at 150 (2d ed. 1978) (describing nondelegation as a failed legal doctrine); BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 12, at 34 (1976) (opining that the nondelegation doctrine "can not be taken literally").

<sup>385</sup> See, e.g., Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 549–70 (2002) (documenting efforts by the Federal Trade Commission, Food and Drug Administration, and National Labor Relations Board to claim previously unasserted legislative rulemaking authority).

<sup>386</sup> See, e.g., HICKMAN & PIERCE, JR., *supra* note 206, § 1.6, at 40 (making this observation and offering examples including the Occupational Safety and Health Act, Consumer Product Safety Act, and statutes administered by the Environmental Protection Agency).

<sup>387</sup> *United States v. Fla. E. Coast Ry.*, 410 U.S. 224, 236–37 (1973) (holding that formal rulemaking procedures apply only when a statute expressly requires a hearing "on the record").

<sup>388</sup> See, e.g., Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 252–53 (2014) ("The upshot of *Florida East Coast Railway* is a 'magic words' requirement—'since *Florida East Coast Railway*, no organic rulemaking statute that does not contain the specific words "on the record" has ever been held to require formal rulemaking.') (quoting Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 857 n.9 (2007)).

<sup>389</sup> See, e.g., Warren E. Baker, *Policy By Rule or Ad Hoc Approach—Which Should It Be?*, 22 L. & CONTEMP. PROBS. 658, 660–65 (1957) (describing advantages of rulemaking over adjudication); Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 513–28 (1970) (describing pros and cons of rulemaking and adjudication as varying depending on the circumstances but recognizing many benefits of rulemaking); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 929–42 (1965) (reviewing the advantages of rulemaking over adjudication).

Another major doctrinal shift around this time concerned justiciability doctrine. In its 1967 decision in *Abbott Laboratories v. Gardner*, the Supreme Court interpreted the APA's judicial review provisions as establishing a presumption in favor of pre-enforcement review of agency rules and regulations.<sup>390</sup> Prior to that decision, the Court had been reluctant to consider challenges to the validity of agency regulations unless and until an agency attempted to enforce a rule in a specific case, and thereby threatened to impose a specific type of injury such as a fine or other legal sanction.<sup>391</sup> After *Abbott Labs*, pre-enforcement judicial review of claims that agency regulations exceeded statutory authority or were otherwise arbitrary and capricious became the norm.<sup>392</sup> Additionally, the Court's 1970 decision in *Association of Data Processing Service Organizations v. Camp* relaxed statutory standing requirements and allowed more people to challenge the actions of agencies under the APA.<sup>393</sup>

These changes in legal doctrine and administrative practice meant that, by the late 1970s, courts found themselves tasked more often with reviewing agency regulations that were sweeping in scope and doing so on a facial rather than an as-applied basis.<sup>394</sup> As Reuel Schiller documented, courts familiar with "deploying more or less strict scrutiny" under the APA's de novo, substantial evidence, and arbitrary and capricious standards of review "increase[d] the intensity with which they reviewed rulemaking."<sup>395</sup> Surveying the different ways to police agency rulemaking explored by the D.C. Circuit as well as Congress and the Administrative Conference of the United States, Schiller particularly linked the expansion of agency rulemaking to an activist D.C. Circuit's development of "hard look review,"<sup>396</sup> which the Supreme Court embraced as a construction of the arbitrary and capricious standard of APA § 706(2)(A) in its 1983 *State Farm* decision.<sup>397</sup> It is not difficult to imagine a similar evolution of APA § 706(2)(A) with *Chevron*, as courts grappled with the policymaking inherent in agencies relying on general authority rulemaking

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<sup>390</sup> *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

<sup>391</sup> See, e.g., *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 77, 89 (1947) (characterizing employee challenge to civil service rules interpreting the Hatch Act as a request for an advisory opinion); see also HICKMAN & PIERCE, JR., *supra* note 206, § 17.12 (describing pre-*Abbott Labs* judicial approach to ripeness).

<sup>392</sup> See HICKMAN & PIERCE, JR., *supra* note 206, § 17.14 ("After *Abbott Labs*, pre-enforcement review of rules became the norm in the large class of cases in which the challenge to the rule's validity raised one or more issues that were susceptible to judicial resolution before the rule was applied.").

<sup>393</sup> *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153-54 (1970); see also 4 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 24:9 (2d ed. 1983) (describing the expansion of standing doctrine).

<sup>394</sup> See Schiller, *supra* note 380, at 1155.

<sup>395</sup> *Id.* at 1155-56.

<sup>396</sup> *Id.* at 1155-56, 1170.

<sup>397</sup> *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-44 (1983).

grants to resolve self-identified statutory ambiguities for which traditional interpretive tools offered no clear answer.

### C. Chevron's Continued Evolution

As a standard of review, it is hardly surprising that *Chevron* itself has evolved incrementally over time through various clarifications and adjustments as agency practices and other administrative law doctrines have changed and as individual cases challenging agency statutory interpretations have raised questions about *Chevron*'s domain and application piecemeal. Sometimes the Supreme Court has applied the *Chevron* doctrine more expansively, for example to interpretive policymaking through adjudication as well as rulemaking and to jurisdictional questions.<sup>398</sup> In other instances, the Court has pared *Chevron* back, for example by rejecting it for agency actions lacking legal force<sup>399</sup> as well as certain major questions.<sup>400</sup> The Court has waffled on the significance of contextual factors like longevity and consistency in *Chevron* analysis.<sup>401</sup> The debates over some of these questions can be arcane and overly complexifying.

Justice Scalia in particular pushed for a more rule-like approach to *Chevron* in the doctrine's early years, undoubtedly in pursuit of his general preference for rules over standards.<sup>402</sup> As William Eskridge and Lauren Baer documented, however, Justice Scalia was among the least likely of his colleagues to actually defer to an agency statutory interpretation.<sup>403</sup> He embraced a robust approach to *Chevron* step one that involved applying traditional tools of statutory interpretation assertively, and he suggested on at least one occasion that he rarely needed to defer to an agency because he had no difficulty finding statutory clarity.<sup>404</sup> The fact that his colleagues were less inclined to pursue statutory clarity as aggressively themselves does not undermine *Chevron*'s categorization as a standard of review. If anything, as discussed, that malleability corresponds to characterizing *Chevron* in this way.

The resulting doctrinal twists and turns perhaps make today's *Chevron* a little or even a lot different from the *Chevron* of thirty years ago. The same can be said, however, of the *State Farm* approach to arbitrary and capricious review

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<sup>398</sup> See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 297–301 (2013).

<sup>399</sup> See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 237–39 (2001).

<sup>400</sup> See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015).

<sup>401</sup> See *Barnhart v. Walton*, 535 U.S. 212, 219–20, 222 (2002); *Brown v. Gardner*, 513 U.S. 115, 122 (1994). See generally Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823 (2015).

<sup>402</sup> See, e.g., Sullivan, *supra* note 34, at 65 (describing Justice Scalia's preference for rules over standards and offering six reasons why).

<sup>403</sup> See Eskridge, Jr. & Baer, *supra* note 84, at 1154.

<sup>404</sup> Scalia, *supra* note 135, at 520–21.

or the substantial evidence standard, both of which the Supreme Court has continued to clarify and refine.<sup>405</sup>

The Court's frequent failure to signal that *Chevron* provides the appropriate standard of review, or even to mention *Chevron* at all in some cases when its application might seem appropriate, does not negate *Chevron*'s categorization as such.<sup>406</sup> As Frederick Liu has observed, "when the statute's meaning is clear, the choice among *Chevron*, *Skidmore*, or some other standard is moot—which probably explains why, in the majority of cases the Court hears in which an agency construction is available, the Court declines to invoke any deference regime whatsoever."<sup>407</sup>

## V. CONCLUSION

Where does this leave us? Courts and litigants struggle with *Chevron* in part because they cannot agree about how *Chevron* works or the circumstances in which *Chevron* ought to apply. Categorizing *Chevron* as a standard of review will not answer every question that arises about the doctrine nor is it likely to make a difference in most cases. This Article does not claim to sweep so widely. Nevertheless, contemplating *Chevron*'s categorical alternatives provides a theoretical starting point for resolving at least some of *Chevron*'s issues.

Categorizing *Chevron* gives courts facing certain issues a coherent baseline for their analysis, rather than forcing them to struggle ad hoc with every new debate. At present, waiver and stare decisis are the most obvious *Chevron* questions that may be informed by the insights of this Article. Standards of review cannot be waived, so if *Chevron* is a standard of review, it is not waivable. If *Chevron* is a standard of review because it is a construction of the APA's arbitrary and capricious standard, then the Court seems more likely to clarify and refine it than to overturn it entirely.

Categorizing *Chevron* as a standard of review, rather than as a rule of decision or a canon of construction, turns the doctrine's pervasiveness and malleability into strengths rather than weaknesses and best recognizes and effectuates the premises that gave rise to *Chevron* in the first place. Properly understood as a standard of review and as an interpretation of APA § 706, *Chevron* respects the traditional role of the courts by allowing them to use the

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<sup>405</sup> See, e.g., *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569, 2574–76 (2019) (rejecting "pretextual" or "contrived reasons" as adequate for reasoned decisionmaking under § 706(2)(A) and *State Farm*); *Biestek v. Berryhill*, 139 S. Ct. 1148, 1155–56 (2019) (concluding that the testimony of an expert witness who refuses to disclose the data supporting her testimony can be substantial evidence); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009) (rejecting "heightened" review under *State Farm* and the arbitrary and capricious standard when an agency changes its mind).

<sup>406</sup> See, e.g., *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 789–90 (2020) (mem.) (Gorsuch, J., statement) (noting that the Court "has often declined to apply *Chevron* deference when the government fails to invoke it").

<sup>407</sup> Liu, *supra* note 195, at 335 n.302.

full range of methods and tools to interpret statutory text and find statutory meaning. But *Chevron* also reminds the courts that they are not the sole source of wisdom in our current system of governance. As long as Congress continues to delegate significant policymaking discretion to agencies, courts must be leery of intruding too deeply into the policy sphere under the guise of interpretation. Categorizing *Chevron* as a standard of review should help the courts maintain that proper balance.

